Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

RICHARD M. CLEWIS, III and THE TAKE BACK TAMPA POLITICAL COMMITTEE,

Petitioners,

v.

ROBIN C. KRIVANEK, as the Hillsborough County Supervisor of Elections,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state law that allows Supervisors of Elections, through a purge of inactive yet registered voters, to deny a class of registered voters the right to petition the government for a referendum, violates the First and Fourteenth Amendments to the United States Constitution.

2. Whether a state law that allows Supervisors of Elections, through a purge of inactive yet registered voters, to deny a class of registered voters the right to petition the government for a referendum, violates the equal protection provision of the Fourteenth Amendment to the United States Constitution.

3. Whether a state law that allows Supervisors of Elections, through an arbitrarily timed purge of inactive yet registered voters, to deny a class of registered voters the right to petition the government for a referendum without providing notice and an opportunity to be heard, violates the due process guarantee of the Fourteenth Amendment to the United States Constitution.

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Petitioners, Richard M. Clewis, III and the Take Back Tampa Political Committee, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Florida Supreme Court entered in the above entitled proceeding on September 30, 1993.

OPINIONS BELOW

The Florida Supreme Court decree appealed from is reported at 18 Fla. L. Weekly S.510, Case Number 80-189 (Fla. Sept. 30, 1993) and is reprinted in Appendix A to this Petition.

The Opinion of the Second District Court of Appeal in and for the State of Florida is reported at 603 So.2d 528 (Fla. 2d DCA 1992) and is reprinted in Appendix B to this Petition.

The Final Order of the Circuit Court in and for the Thirteenth Judicial Circuit of the State of Florida has not been reported and is reprinted in Appendix C to this Petition.

JURISDICTIONAL STATEMENT

The decree sought to be reviewed is a final decree of the Supreme Court of Florida dated September 30, 1993. No order exists respecting a rehearing or granting an extension of time within which to file this Petition for Writ of Certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Petitioners seek review of a decree rendered by the highest court of a state in which a

decision could be had wherein the validity of a statute of the state is drawn in question on the ground of its being repugnant to the United States Constitution.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTIONAL PROVISIONS:

1. The Constitution of the United States – Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or breaching the freedom of speech, or the press; or the right of the people peacefully to assemble, and to petition the government for a redress of grievances.

2. The Constitution of the United States – Amendment 14 – Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATUTES:

1. Section 98.081(1), Fla. Stats. (1991)

Removal of names from registration books; procedure.

(1) During each odd-numbered year, the supervisor shall mail to each elector who, during the past 2 years, did not vote in any election in the county or did not make a written request that his registration records be updated, a form to be filled in, signed, and returned by mail within 30 days after the notice is postmarked. The form returned shall advise the supervisor whether the elector's status has changed from that of the registration record. Electors failing to return the forms within this period shall have their names withdrawn temporarily from registration books. In addition, the name of an elector may be removed temporarily from the registration books when any first-class mail sent by the supervisor to the elector is returned as undeliverable. Such name shall not be removed until a diligent effort has been made by the supervisor to locate such elector. This shall constitute such notice for purposes of this section. The list of the electors temporarily withdrawn shall be posted at the courthouse. When the list is completed, the supervisor shall provide a copy thereof, upon request, to the chairman of the county executive committee of any political party, and the supervisor may charge the actual cost of duplicating the list. A name shall be restored to the registration records when the elector, in writing, makes known to the supervisor that his status has not changed. A federal postcard application from a citizen overseas indicating that the elector's status has not changed shall constitute such a written notification to the supervisor. The supervisor shall then reinstate the name on the registration books without requiring the elector to reregister. Notice of these requirements shall be printed on

the voter registration identification card. This method prescribed for the removal of names is cumulative to other provisions of law relating to the removal of names from registration books. This is not a reregistration but a method to be used for keeping the permanent registration list up to date.

2. Section 10.07, Tampa City Charter.

Initiative and Referendum.

The qualified voters of the city shall have power to propose ordinances to the council or to require reconsideration of any adopted ordinance by petition signed by the electors of the city equal in number to not less than 10 percent of the electors of the city qualified to vote at the last general municipal election; the form and content of such petition shall be as provided for under the provisions relating to recall of officers as herein provided. If the council fails to adopt an ordinance so proposed or to repeal an ordinance so proposed or to repeal an ordinance so reconsidered, the qualified voters shall approve or reject such ordinance at a city election provided that such powers shall not extend to the budget or capital improvement program or any emergency ordinance, or ordinance relating to appropriation of money, levy of taxes or salaries of city officers or employees.

STATEMENT OF THE CASE

In May, 1991 the City of Tampa adopted a sexual orientation ordinance. Richard M. Clewis, III ("Clewis"), a registered voter and elector of the City of Tampa, and

other citizens opposed to the ordinance, formed a committee called "Take Back Tampa," which Clewis chaired, for the purpose of petitioning the City to hold a referendum to repeal the ordinance. The City Charter requires City Council, upon receipt of a valid petition for repeal, to reconsider an ordinance and, if Council fails to repeal it, to call a referendum on the reconsidered ordinance. The petition must bear the signatures of 10% of the electors in Tampa, which the petition circulator must obtain during a 60 day circulation period. Section 10.07, Tampa City Charter.

Clewis and Take Back Tampa began circulating their petition in early June, 1991. While Clewis and Take Back Tampa were circulating their petition, the Respondent, Supervisor of Elections of the City of Tampa (hereinafter "Supervisor"), temporarily withdrew from the voter registration records the names of all registered voters who her records showed had not voted in two years and who had not returned a reinstatement card[1] to her. Florida, like other states,[2] has a purge statute whereby

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[1] Florida's purge statute provides that a temporarily withdrawn elector shall be reinstated to active status upon giving written notification to the Supervisor that his status has not changed. Section 98.081(1), Fla. Stats. (1991). One means of reinstatement is to return to the Supervisor a reinstatement card, upon which the elector is to write his or her current name and address and to check a box that says simply, "Yes, I want to remain a voter". (A copy of the reinstatement notice is attached as App. D).

[2] *See*: Ala. Code § 17-4-186 (1993); Colo. Rev. Stat. § 1-2-224 (1993); Ga. Code Ann. § 21-3-133 (1993); 1993 Ind. Acts 3; Ky. Rev. Stat. Ann. § 116.112 (Baldwin 1993); Miss. Code Ann. § 23-15-159 (1993); N.C. Gen. Stat. § 163-69 (1993); R.I. Gen.

supervisors of elections "temporarily withdraw" registered voters who have not voted in two years to a list of inactive registered voters. Section 98.081(1) Fla. Stats. (1991). (App. F, pp. A70 – A71). If these "temporarily withdrawn" registered voters do not vote or obtain reinstatement during the following three years then they lose their registration and their names are "removed" from the registration record. Section 98.081(2) Fla. Stats. (1991). (App. F, p. A71). Florida's purge statute requires all supervisors to conduct a purge every odd numbered year on any day during the year selected in the supervisor's sole discretion. Temporarily withdrawn electors do not lose their registration or legal status as registered voters and can vote by signing a reinstatement notice at the polls. Section 98.081(1), Fla. Stats. (1991). (App. E, pp. A67 – A68).

The purge statute does not disclose that temporarily withdrawn registered voters lose their right to petition the government for a referendum. The statute also does not require supervisors to notify registered voters whose names they intend to put on the purge list, that they will lose their right to express their political views on city ordinances through a referendum petition. The Supervisor did not give any such notice in this case.

Laws § 17-10-1 (1992); S.D. Codified Laws § 12-4-19 (1993); Tenn. Code Ann. § 2-2-106 (1993); Utah Code Ann. § 20A-5-402 (1993); Va. Code Ann. § 24.1-59 (1993). Many of these purge statutes, like Florida's, provide a two-step purge procedure, started with "temporary withdrawal" and then followed after years of voter activity with "removal."

The Petitioners delivered their signed petitions to the Supervisor by the deadline date, signed by enough registered voters to compel the City to hold a referendum on the ordinance. The Supervisor, who is required by law to verify the validity of all signatures on the petition[3], refused to consider the petition signatures of registered voters whose names she temporarily withdrew from the registration record and who signed the petition after the purge date. Through the arbitrarily timed purge, the Supervisor silenced many citizens who sought to express their political view on the ordinance through the referendum petition. As a result, Clewis and Take Back Tampa lacked the number of petition signatures required to compel the City to hold a referendum.

The Supervisor had the means to verify the validity of the signatures of all registered voters moved to the inactive list. She possessed at all relevant times, both before and after the purge, the original voter registration cards containing the voters' signatures and status information for all (active and inactive) registered voters, and computerized copies of all voter registration cards. (App. E, pp. A62 – A66). The Supervisor used those records to verify the signatures of all registered voters on the inactive list who signed the petition before the purge date. Accordingly, registered voters either were granted or denied their right to petition the government based solely upon whether they signed the petition before, rather than after, the arbitrarily selected purge date.

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[3] Section 100.361(1)(d) and (h), Fla. Stats. (1991).

Clewis and Take Back Tampa sued the Supervisor in state court to compel her to count the valid signatures of registered voters on the inactive list that she had rejected solely because they signed the petition after the purge date. Petitioners alleged in their suit that the refusal to count the signatures of this class of registered voters violated the First and Fourteenth Amendments of the United States Constitution. (App. G, pp. A105-A107). Petitioners also argued that the Supervisor, upon delivery of the petition to the Supervisor, should have reinstated to active status all inactive voters who signed the petition, because the signed and delivered petition satisfied the requirements for reinstatement.[4] The Supervisor argued that exclusion of the inactive voters who signed the petition after the purge date furthered the state's interest in preventing fraud.

The trial court agreed that the denial of the right to petition violated the United States Constitution and that the inactive registered voters should have been allowed to petition the government. (App. C). The trial court also held that the signed petition gave all the information required for reinstatement, so that inactive voters who signed the petition should have been treated the same for purposes of petitioning the government as active voters. (App. C at pp. A44 – A45). The court ordered the Supervisor to verify the petition signatures of all registered

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[4] The petition informs the Supervisor that the signatory is a "registered voter of the City of Tampa," and provides the signatory's current name, address and precinct number. A petition signatory's signature is witnessed in writing by the circulator and the circulator's signature is notarized. (App. G, pp. A78-A81).

voters who signed the petition and whose signatures the Supervisor had rejected because they signed the petition after the Supervisor had moved their names to the inactive list. The Supervisor was easily able to comply with the order because she still had in her records all of the inactive voters' registration information. When the Supervisor counted the valid signatures of these registered voters, the petition contained enough signatures to require the City to hold the referendum.

The Supervisor appealed the order to the Second District Court of Appeals of Florida, which unanimously affirmed. (App. B). She then appealed to the Florida Supreme Court. While the Supervisor's appeal to the Florida Supreme Court was pending, the City held a referendum on the sexual orientation ordinance. Nearly 60 percent of the voters of Tampa elected to repeal the ordinance.

On September 30, 1993, the Florida Supreme Court reversed the Court of Appeals. The court recognized that the right to petition the government was a fundamental, constitutional right (App. A, p. A8), but held that the Supervisor had authority under the statute to reject the signatures of registered voters whose names she had temporarily withdrawn. (App. A). The Florida Supreme Court held that registered voters temporarily withdrawn to the inactive list were not qualified to petition the City of Tampa for a referendum. (App. A, pp. A1 – A2). The court also said that the Supervisor was not required to reinstate inactive voters who signed the petition to active status because the petition was delivered to the Supervisor by Take Back Tampa, who the court called a "biased advocate." (App. A, pp. A10 and A12). The Florida

Supreme Court held that these restrictions on the right to petition did not violate the United States Constitution because they were reasonable regulations, related to the state's interest in preserving the integrity of the petition and elective processes. (App. A, pp. A9 – A10 and A12 – A13).

REASONS FOR GRANTING THE WRIT

I.

FLORIDA'S PURGE STATUTE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A CLASS OF REGISTERED VOTERS THE RIGHT TO PETITION THE GOVERNMENT FOR A REFERENDUM, WITHOUT BEING NARROWLY DRAWN TO ADVANCE A COMPELLING STATE INTEREST.

The Florida Supreme Court, contrary to the First and Fourteenth Amendments of the United States Constitution, upheld the validity of a state statute that allows supervisors of elections, through an arbitrarily timed purge, to deny a class of registered voters their right to petition the government for a referendum. In upholding the complete denial of the right to petition to these registered voters, the Florida Supreme Court ignored the principles set forth by this court in *Meyer v. Grant*, 486 U.S. 414 (1988), requiring laws restricting the right to petition the government for a voter initiative to be narrowly drawn to advance a compelling state interest.

This case raises important constitutional questions, deserving of this Court's attention, regarding the use of

voter purge statutes to deny a class of registered voters their right to petition the government for a referendum and to ban those citizens from engaging in political speech through a referendum petition. This Court has not yet ruled upon the constitutionality of a state voter purge statute used to deny the First Amendment right to petition the government. The Court's resolution of this issue will affect citizens throughout the United States who are disillusioned with representative democracy, and are turning to referenda and other means of direct democracy to express their political views. These citizens should not be penalized for not voting, by denying them their right to petition for a referendum. This muzzling of political speech is exactly the type of government action that this court condemned in *Meyer v. Grant*. The Florida Supreme Court's application of the voter purge statute is repugnant to the United States Constitution because it completely denies the right to petition the government for a referendum to a class of citizens, without a compelling reason for doing so.

The right to petition the government for redress of grievances is guaranteed to all citizens by the First Amendment to the United States Constitution, U.S.C.A. Const. Amend. 1. This Court has declared it to be "among the most precious of liberties safeguarded by the Bill of Rights." *United Mine Workers of America v. Illinois State Bar Assn.*, 389 U.S. 217, 222 (1967). It is among the fundamental personal rights and liberties secured to all "citizens" by the Fourteenth Amendment against abridgment by a state. *Id.* at 221, f.n. 4; *Meyer v. Grant*, 486 U.S. 414, 420 (1988). One means of preserving this right is through the

referendum procedure. *Diaz v. Board of County Comm'rs*, 502 F.Supp. 190, 193 (S.D. Fla. 1980).

The referendum is "a means for direct political participation, allowing the people the final decision . . . over enactments of representative bodies." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 673 (1976). This Court has described the referendum procedure as a "classic demonstration of 'devotion to democracy'." 426 U.S. at 679, *citing James v. Valtierra*, 402 U.S. 137, 141 (1971).

The referendum also is a means of political expression. *City of Eastlake, supra*, 426 U.S. at 673 ("The [referendum] practice is designed to 'give citizens a voice on questions of public policy'," *citing James v. Valtierra*, 402 U.S. at 141); *McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition . . . is an assurance of a particular freedom of expression.") This Court has characterized participation in the initiative process through circulation of a petition as "core political speech." *Meyer v. Grant*, 486 U.S. at 422.

State laws regulating petition procedures for initiatives or referenda involve "a limitation on political expression subject to exacting scrutiny." *Meyer*, 486 U.S. at 420 and 423.[5] Restrictions in such laws must be "narrowly drawn to advance a state interest of compelling

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[5] The standard is not lessened because the power of initiative and referendum is a state created right. *Meyer*, 486 U.S. at 424. Once the power of referendum is given, the government cannot ban a class of citizens from expressing their political views through a referendum petition, without a compelling state interest for doing so. *Meyer*, 486 U.S. at 425. *See also, Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987); *aff'd*, 486 U.S. 414 (1988) (the state's decision to reserve the initiative for the

importance." *Norman v. Reed*, 112 S.Ct. 698, 705 (1992); *see also, Pena v. Nelson*, 400 F.Supp. 493, 496 (D. Ariz. 1975) (holding that a municipality may not refuse to accept voters' signatures on a petition unless there is an "articulable, substantial and compelling state interest" which outweighs the fundamental right to petition the government).

Florida's voter purge statute is not narrowly drawn to advance a compelling state interest. It denies citizens classified as inactive registered voters their constitutional right to express their political views through a referendum petition without furthering the alleged interest of preventing fraud. The Florida Supreme Court's validation of the statute based solely upon the statute's alleged reasonableness, directly conflicts with *Meyer v. Grant* and should be reviewed by this Court. The Florida purge statute is overly broad in three ways. First, it needlessly denies the right to petition the government for a referendum to citizens whose signatures and voter registration information are in the Supervisor's records and available to verify the validity of their petition signatures. Exclusion of these signatures from the petition verification process does nothing to prevent fraud. Second, it allows the Supervisor to arbitrarily time the voter purge so that registered voters, whose petition signatures otherwise would be counted, are denied their constitutional right to petition the government for a referendum. Third, it needlessly denies reinstatement to active status to registered

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people does not leave the state free to condition its use by impermissible restraints on First Amendment activity.)

voters who provide the Supervisor with written reinstatement notification delivered by a petition circulator.

1. The purge statute needlessly denies the right to petition the government to inactive registered voters whose signatures and voter registration information are available to the Supervisor in her official records to verify their petition signatures.

The same information that the supervisors use to verify the validity of petition signatures of registered voters on the active list is available to verify the petition signatures of registered voters on the inactive list. The means for the supervisor to detect a forged petition signature or to otherwise validate the petition signatories' registration information is the same for active and inactive registered voters. (App. E, pp. A62 – A64). The signatures of citizens classified as inactive registered voters are not inherently more suspect than the signatures of citizens classified as active registered voters. The state's interest in preventing fraud, therefore, was not furthered in this case by refusing to consider the petition signatures of citizens classified as inactive registered voters when they signed the petition. The refusal to count their signatures was an unnecessary restraint on the right to petition the government and to engage in political expression through a referendum petition.

The Florida Supreme Court ignored this Court's ruling in *Meyer v. Grant* that laws which restrict the right to petition the government must be "necessary" to further a compelling state interest. *Meyer v. Grant*, 486 U.S. at 427. The petition law scrutinized in *Meyer* outlawed payment

of a fee to petition circulators for obtaining petition signatures. 486 U.S. at 417 – 418. The state in *Meyer*, like the Supervisor in this case, argued that the law furthered a compelling state interest by preventing fraud and "protecting the integrity of the initiative process." 486 U.S. at 419 and 425. This Court held that the restriction was not justified because it was not "necessary . . . to meet [the state's] concerns" over integrity and prevention of fraud. *Meyer*, 486 U.S. at 425. The state failed to demonstrate that payment of a circulator fee might tempt a circulator to be dishonest. There was no showing, therefore, that the restriction actually helped to prevent fraud. *Meyer v. Grant*, 486 U.S. at 426.

There has been no showing in this case that excluding the petition signatures of registered voters, placed on the inactive list before they signed the petition, is necessary to prevent fraud.[6] The Florida Supreme Court's opinion, upholding the Supervisor's ban on these citizens from engaging in political expression through a referendum petition, directly conflicts with *Meyer v. Grant*.

The Florida Supreme Court, in direct conflict with *Meyer*, also ignored the many statutory safeguards in Florida against fraud in the petition and elective processes that are less restrictive on the right to petition than

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[6] There similarly has been no showing that the state's concerns about fraud justify restricting the right to petition to only registered voters. The right to petition and engage in political expression through a petition belongs to all "citizens," not just registered voters. First and Fourteenth Amendments to the United States Constitution, U.S.C.A. Const. Amend. 1 and 14.

the complete denial of that right which occurred here. Florida law makes it a felony for any person to perpetrate or aid in the perpetration of voter fraud. Section 104.041, Fla. Stats. (1991). Each petition circulator is required by law to state under oath that he saw the petition signed by the elector, each signature appearing on the petition is the genuine signature of the person it purports to be and that the petition was signed in the presence of the circulator on the date indicated. Section 100.361(1)(c), Fla. Stats. (1991). The petition at issue in this case contained such oaths and a notarization of each of the circulators' signatures. (App. G, pp. A78-A81). All elections office personnel must take an oath that they will prevent fraud. Sections 98.271(1) and 102.012, Fla. Stats. (1991). The Florida Department of State audits every county's voting system every five years to make sure that adequate safeguards exist to prevent voter fraud. Section 101.591, Fla. Stats. (1991). This Court found nearly identical statutory protections against fraud in *Meyer* to be "adequate . . . to minimizing the risk of improper conduct in the circulation of a petition." 486 U.S. at 427.[7] When such less restrictive fraud prevention safeguards exist, the state need not attempt to prevent fraud in the petition process through an overreaching statute that denies the right to petition to all citizens classified as inactive registered voters. *Meyer*, 486 U.S. at 427.

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[7] These less intrusive fraud prevention statutes are sufficient to meet the state's concerns for integrity in *the petition process* because the "risk of fraud or corruption, or the appearance thereof" is "more remote at the petition stage of a petition initiative than at the time of balloting." *Meyer*, 486 U.S. at 427.

2. The purge statute is not narrowly drawn to further a compelling state interest because it allows a Supervisor to arbitrarily time the purge so that a class of citizens, whose petition signatures otherwise would be counted, are denied the right to petition the government for a referendum.

The exclusion from the petition verification process of petition signatures of registered voters moved to the inactive list on the purge date and who signed the petition after the purge, does nothing to prevent fraud or preserve integrity in the petition and elective processes. As has been shown, the fortuitousness of signing one day before the arbitrarily timed purge, rather than one day after, does not affect the Supervisor's ability to verify or validate the signature nor make the signature any more or less suspect. If the Supervisor had timed the purge for August, 1991 or later, after the petition drive had ended, then the petition signatures of all the inactive voters that she rejected would have been counted. If she had timed the purge to occur before the petition drive had started, then she would have rejected the signatures of some of the registered voters which she counted. The Supervisor has not shown how the arbitrary timing of the purge in June, during the circulation of the petition, made the possibility of fraud any less or more likely than if the purge had occurred at a different time. No justification exists for this arbitrary distinction. The purge statute, as applied by the Florida Supreme Court, goes too far in denying the right to petition for a referendum based solely upon an arbitrarily timed purge.

Absent a showing that the timing of the purge prevents fraud in the petition process, supervisors should not be given such absolute discretion over the timing of the purge. A supervisor could abuse this power and cut off political speech rights of many citizens through timing the purge to affect the outcome of any citizen petition important to the supervisor. The grant of such broad power to supervisors, which allows them in their sole discretion to deny a class of citizens the right to petition the government, is not necessary to achieve any compelling state interest and fails the strict scrutiny test. *Meyer v. Grant*, 486 U.S. at 423.

3. The purge statute is overly broad because it denies reinstatement to registered voters who provide the Supervisor with written reinstatement notification delivered to the Supervisor by a petition circulator, thereby denying those voters their right to petition for a referendum.

Even if conditioning the right to petition on voter registration and active voting was constitutional, the Florida Supreme Court's judgment and opinion still violates the Constitution as articulated by this Court in *Meyer*, by refusing reinstatement to active status to inactive voters who signed the petition. Although the referendum petition contains all of the information required by statute for reinstatement to the active voters list, the Florida Supreme Court held that reinstatement is not required under the statute if the Supervisor receives such written reinstatement notification from a "biased" petition circulator. (App. A, pp. A10 and A12). The alleged justification for this restriction is the prevention of fraud.

No showing has been made, however, that delivery of a reinstatement notice by a "biased advocate" will tempt circulators to commit fraud. This Court struck down the petition restriction law at issue in *Meyer v. Grant*, when the state failed to demonstrate by evidence in the record that payment of a circulator fee might tempt circulators to commit fraud. 486 U.S. at 425.

The rejection of a reinstatement notification based solely upon its delivery to the Supervisor by a biased advocate does not withstand strict scrutiny. When a biased circulator delivers the notice to the Supervisor, the opportunity for fraud is no greater than if a biased mailman delivered the notice. The sexual orientation issue on the referendum petition was an emotional topic in Tampa, over which most citizens, including the mailman, the Supervisor and her staff, likely had some bias. Fraud cannot be presumed in the petition process simply because the party delivering a petition containing all necessary reinstatement information has some bias. *Meyer v. Grant*, 486 U.S. at 425 (holding that the state could not presume that payment of a circulator fee would tempt circulators to commit fraud). Moreover, no evidence exists to show that a biased circulator's participation in reinstatement causes fraud to occur in the petition process. The Florida Supreme Court's refusal to allow delivery to the Supervisor of a signed, notarized petition to reinstate those inactive registered voters to active status, denied the inactive voters the right to petition and to engage in political speech through the petition process, without furthering any compelling state interest.

The Florida Supreme Court's broad, sweeping denial of the right to petition to all citizens whose reinstatement

notification came to the Supervisor through a petition circulator lacks justification in light of the Florida laws allowing political parties, political committees and other biased persons to participate in voter registration. Section 98.271(1), Fla. Stats. (1991) allows any person, biased or not, to be appointed as a volunteer deputy registrar with full authority to register voters and accept changes in registration, even though the risk of fraud is greater in voter registrations for elections than is present in reinstatements for participating in referendum petitions. *Meyer v. Grant*, 486 U.S. at 427. The Florida statute specifically provides that no person shall be denied appointment as a volunteer deputy voter registrar "simply because of his . . . political affiliation, organizational involvement, or political activity." Section 98.271(2), Fla. Stats. (1991). No compelling state interest is served by allowing biased advocates to register citizens to vote, but not allowing them to participate in reinstating inactive voters to active status.

II.

THE DENIAL OF THE RIGHT TO PETITION THE GOVERNMENT TO A PARTICULAR CLASS OF REGISTERED VOTERS VIOLATES THE EQUAL PROTECTION PROVISION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Fundamental, First Amendment rights, such as the rights to petition and engage in political speech through petitioning, are protected from infringement by the states by the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Williams v. Rhodes*, 393 U.S. 23, 30 – 31 (1968); *Pena, supra*, 440 F.Supp. at 496.

Accordingly, states may not casually deprive a fundamental right to a "class of voters" because of some remote administrative benefit. *Carrington v. Rash*, 380 U.S. 89, 96 (1965). Yet the Florida Supreme Court's application of the purge statute did just that, in direct conflict with the United States Constitution.

The purge statute creates two classes of registered voters: those on the active list and those registered voters temporarily withdrawn to the inactive list. Although both classes are registered to vote and may vote without reregistering, only the class of registered voters on the active list may petition the government. Those registered voters withdrawn to the inactive list by an arbitrarily timed purge are disenfranchised from the petition process.

This distinction may serve some remote administrative purpose, but it does nothing to further the state's interest in preventing fraud in the petition process. The Supervisor's refusal to accept petition signatures of temporarily withdrawn registered voters, whose inactive status results solely from an arbitrarily timed purge based on only two years of voting inactivity, "imposes an invidious discrimination in violation of the Fourteenth Amendment." *Carrington*, 380 U.S. at 96.

Certiorari should be granted to protect the First Amendment right of all citizens in this disenfranchised class to petition the government for a referendum. Large numbers of citizens can be disenfranchised from the petition process through administrative purge statutes like this one. In Florida, only 23.4 percent of the voting age population of the state voted in the 1990 general election.

U.S. Dept. of Commerce, Statistical Abstract of the United States 1992, 272. This indicates that a significant percentage of the voting population of Florida likely was temporarily withdrawn to inactive status during the purges made in 1991. This growing group of disillusioned citizens should not be further alienated from the political process by invidious discrimination that denies them their right to petition the government for a referendum based solely upon a two year period of voting inactivity. Certiorari should be granted to decide the issue of whether the equal protection guarantee of the Fourteenth Amendment permits the state to condition the right to political expression through a referendum petition upon the exercise of the right to vote during a two year period.

III.

THE FAILURE TO GIVE NOTICE TO REGISTERED VOTERS WHO WILL BE DISENFRANCHISED BY THE ARBITRARILY TIMED PURGE THAT THEY WILL LOSE THEIR RIGHT TO PETITION THE GOVERNMENT FOR A REFERENDUM VIOLATES THE DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION.

Neither the purge statute nor the reinstatement card that Supervisors are supposed to send to voters, put registered voters on notice that they will lose their constitutional right to petition the government for a referendum if their names are temporarily withdrawn to the inactive list. Nonetheless, the Florida Supreme Court held that supervisors of elections may refuse to count valid petition signatures of registered voters on the list of inactive voters. This violates the procedural due process

guarantees provided to citizens by the Fourteenth Amendment to the United States Constitution.

The right to petition the government, as a fundamental First Amendment right, is a "liberty" interest which may not be confiscated without due process. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Williams v. Rhodes*, 393 U.S. 23 (1968); *De Jonge v. State of Oregon*, 299 U.S. 353 (1937); *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970); *Pena v. Nelson*, 400 F.Supp. 493 (D. Ariz. 1975). An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). The central meaning of procedural due process is clear: "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. at 314.

The purge statute does not require that a registered voter be put on notice that he will lose his constitutional right to petition the government for a referendum if his name is temporarily withdrawn to the inactive list. The only pre-deprivation notice that a registered voter receives is a card (App. D) that says nothing about loss of the constitutional right to petition the government for a referendum. The purge statute does not provide for post-

deprivation notice either. Registered voters on the inactive list are never notified that their failure to vote for two years or to sign a reinstatement card causes them to lose their right to petition for a referendum and bans them from engaging in political speech through the petition process. Certiorari should be granted to answer the important question of whether due process requires the state to give notice to citizens that by failing to vote or take other action they will be banned from expressing political views through a referendum petition.

CONCLUSION

Certiorari should be granted for the reasons given above in this Petition. The right to express political views through the petition process should not be conditioned on voter registration and active voting. The use of an arbitrarily timed voter purge to disenfranchise citizens from the petition process violates the First and Fourteenth Amendments to the United States Constitution. The Court should decide these important First Amendment issues and resolve the conflict between the Florida Supreme Court's decree, validating the use of a voter purge statute to deny the right to petition based upon reasonableness, and the constitutional principles outlined in *Meyer v. Grant*, requiring laws restricting the right to

petition to be narrowly drawn to further a compelling state interest.

Respectfully submitted,

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and

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APPENDIX A

Supreme Court of Florida

No. 80,189

ROBIN C. KRIVANEK, as Hillsborough County Supervisor of Elections,
Petitioner,

vs.

THE TAKE BACK TAMPA POLITICAL COMMITTEE, et al., Respondents.

[September 30, 1993]

OVERTON, J.

We have for review *Krivanek v. Take Back Tampa Political Committee*, 603 So. 2d 528 (Fla. 2d DCA 1992), in which the district court of appeal affirmed the trial court's issuance of a writ of mandamus that required Robin C. Krivanek, as the Supervisor of Elections of Hillsborough County, to count and validate the petition signatures of 462 voters whose names had been temporarily purged from the permanent registration books of Hillsborough County under the provisions of section 98.081, Florida Statutes (1991). We find that the district court's decision in this case expressly affects a class of constitutional officers, specifically, how supervisors of elections are to determine the validity of signatures on initiative petitions. Consequently, we have jurisdiction under article V, section 3 (b)(3), of the Florida Constitution. For the reasons expressed, we find that electors whose names have been temporarily removed from the voter registration

books are not qualified to sign initiative petitions under the statutory legislative scheme that establishes voter qualifications, and we quash the district court's decision. This case involves the construction of section 98.081, which provides, in pertinent part:

> (1) During each odd-numbered year, the supervisor shall mail, to each elector who, during the past 2 years, did not vote in any election in the county or did not make a written request that his registration records be updated, a form to be filled in, signed, and returned by mail within 30 days after the notice is postmarked. The form returned shall advise the supervisor whether the elector's status has changed from that of the registration record. Electors failing to return the forms within this period shall have their names withdrawn temporarily from registration books. In addition, the name of an elector may be removed temporarily from the registration books when any first-class mail sent by the Supervisor to the elector is returned as undeliverable. Such name shall not be removed until a diligent effort has been made by the supervisor to locate such elector. This shall constitute such notice for purposes of this section. The list of the electors temporarily withdrawn shall be posted at the courthouse. When the list is completed, the supervisor shall provide a copy thereof, upon request, to the chairman of the county executive committee of any political party, and the supervisor may charge the actual cost of duplicating the list. A name shall be restored to the registration records when the elector, in writing, makes known to the supervisor that his status has not changed. A federal postcard application from a citizen overseas

indicating that the elector's status has not changed shall constitute such a written notification to the supervisor. The supervisor shall then reinstate the name on the registration books without requiring the elector to reregister. Notice of these requirements shall be printed on the voter registration identification card. This method prescribed for the removal of names is cumulative to other provisions of law relating to the removal of names from registration books. This is not a reregistration but a method to be used for keeping the permanent registration list up to date.

(2) The name of any elector temporarily withdrawn from the registration books shall be removed from such books if the elector fails to respond to the notice mailed pursuant to subsection (1) within 3 years from the date the last such notice was mailed to him, and such person shall be required to reregister to have his name restored to the registration books. Receipt of a federal postcard application shall constitute written authorization for such a reregistration.

As indicated by this section, supervisors of elections are required, during each odd-numbered year, to mail information cards to registered voters who have not voted in the last two years. Under the provisions of the statute, the names of voters who fail to return the information cards are "temporarily" purged from the permanent registration books. The name of any voter who fails to respond to the supervisor within three years of temporary removal is "permanently" removed from the registration books and must reregister to have the voter's name restored. The purpose of these provisions is to assure that voters who have not voted in the last two years are still alive and still

reside at the locations indicated on the voter registration rolls.

During the time that the Hillsborough County Supervisor of Elections was purging her voter records in accordance with section 98.081, The Take Back Tampa Political Committee (the Committee) initiated a petition drive pursuant to the Tampa City Charter seeking to repeal a city ordinance through a city-wide vote. When the Committee obtained the requisite number of signatures, it submitted the petition to Krivanek to count and validate the signatures pursuant to section 100.361(d), Florida Statutes (1991). Krivanek refused to validate the petition signatures of 462 voters whose names had been temporarily purged from her permanent registration books. As a result, the Committee did not have enough signatures to place the issue on the ballot.

On petition of the Committee, the trial court issued a writ of mandamus requiring Krivanek to count the signatures of those voters whose names had been temporarily, but not permanently, removed from the registration books if the signatures were otherwise valid. Krivanek complied with the mandamus and validated the petition, but filed an appeal with the Second District Court of Appeal in which she argued that the circuit court erroneously construed the statute in issuing the writ of mandamus.

The district court affirmed the trial court, finding that the legislature has clearly expressed its intention that an elector remains "qualified" to vote or to sign petitions for three years after being temporarily removed from the voter registration books "because it is only after that

three-year period has passed that a person must register anew to once again become a qualified elector under [section 98.081]." *Krivanek*, 603 So. 2d at 535. In so finding, the district court incorporated the trial court's final order into its opinion. In that final order, the trial court determined that, similar to restrictions on the right to vote, restrictions on the right to petition must be liberally construed in favor of the petitioner.

Krivanek, as Supervisor of Elections, claims that the district court's decision erroneously affirmed the trial court's issuance of the writ of mandamus. In support of that claim, she raises three issues, stating that: (1) the Committee has no standing to bring this action; (2) the district court erred in determining that voters whose names had been temporarily removed from the registration books retained their legal status as qualified voters; and (3) the district court erred in adopting the circuit court's analysis of the Committee's constitutional rights. Additionally, Krivanek contends that, even should this Court rule in favor of the Committee on these three issues, this case must still be remanded for a decision as to how many qualified electors existed at the last municipal election. Krivanek bases this contention on the rationale that the district court's construction of the statute would effectively increase the number of qualified voters and, consequently, increase the actual number of signatures necessary to qualify the petition.

With regard to the first issue, we find that Krivanek has waived the right to raise the issue of standing because this issue has been raised for the first time in her petition to this Court. The issue of standing should have been raised as an affirmative defense before the trial

court, and Krivanek's failure to do so constitutes a waiver of that defense, precluding her from raising that issue now. *See, e.g., Cowart v. City of West Palm Beach*, 255 So. 2d 673 (Fla. 1971).

Next, we address Krivanek's second and third issues. The second is whether the district court erred in determining that voters whose names had been temporarily removed from the registration books retained their legal status as qualified voters so as to enable their signatures to be counted in validating the petition. The third issue concerns certain constitutional rights of the Committee, as articulated in the circuit court's judgment.

Krivanek asserts that, under section 98.081, once an elector's name has been temporarily purged from a supervisor's permanent registration system, the elector is ineligible to vote or sign a petition until "the elector, *in writing, makes known to the supervisor* that [the elector's] status has not changed." (Emphasis added.) Krivanek, as the Supervisor of Elections, emphasizes that, in refusing to validate the signatures at issue, she acted in accordance with Division of Elections advisory opinion 87-16, which interprets section 98.081. That opinion states that temporary removal under section 98.081 not only prohibits an elector from voting but also prohibits an elector from validly signing an initiative petition. Additionally, although Krivanek readily admits that she has a clear legal duty to verify the signatures, she contends that no clearly defined method for performing that duty exists. As such, she asserts that she is to use her "best judgment" in determining the method for verifying signatures. In applying that judgment in counting and validating the

signatures at issue, she relied on the Division of Elections opinion and refused to validate the signatures.

The Committee, on the other hand, asserts that the electors' signatures should be counted because such electors, by signing the petition, effectively notified Krivanek, in writing, of their status so as to reinstate themselves to the active voter registration list. The Committee contends that Division of Elections advisory opinion 91-01 supports this position. Additionally, the Committee notes that the legislature, in section 98.081, continues to refer to an individual as an "elector" even after the individual's name has been temporarily removed from the permanent registration list; however, after permanent removal, an individual is referred to as a "person" rather than an "elector." Further, the Committee stresses that, while a voter whose name has been temporarily removed from the registration list need only notify the supervisor in writing to be eligible to vote, a voter whose name has been permanently removed must completely reregister to vote. Because election laws should be construed liberally in favor of the right to vote, the Committee argues that the legislature's continued use of the term "electors" for temporarily removed voters in section 98.081 should be construed to allow their signatures to be counted and validated. This is because, in their view, the electors were still "qualified voters" within the meaning of the Tampa City Charter.

The Tampa City Charter authorizes the particular petition at issue. Section 10.07 of that charter provides that the "qualified voters" of the city may require reconsideration of any adopted ordinance by petition. Such a petition is similar in nature to the initiative petition

authorized by article XI, section 3, of the Florida Constitution, and, as indicated by the trial court, is a form of democratic expression derived from the First Amendment of the federal constitution and article I, section 5, of the Florida Constitution.

> Citizens have the unquestioned right to petition their governments for redress of what they believe are grievances. U. S. Const. amend. I; Fla. Const. art. I, § 5. One means of preserving this right is through the procedures of initiative, referendum and recall.

Diaz v. Board of County Comm'rs, 502 F. Supp. 190, 193 (S.D. Fla. 1980).

Given its constitutional underpinnings, the right to petition is inherent and absolute. This does not mean, however, that such a right is not subject to reasonable regulation. Quite the contrary, reasonable regulations on the right to vote and on the petition process are necessary to ensure ballot integrity and a valid election process. *See, e.g., State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561 (Fla. 1980) (Legislature and secretary of state may impose reasonable regulations on process of petition validation to ensure expeditious and proper verification of petition signatures). Section 98.081's requirements are an example of such reasonable regulations.

In interpreting section 98.081, the Division of Elections expressly addressed the issue of whether an elector who had been temporarily removed from the permanent registration records is prohibited from signing a petition by stating the following:

> Section 98.081(1), Florida Statutes, further provides that an elector's name will be restored to the registration records without reregistration when the elector makes known to the supervisor in writing that his status has not changed.
>
> *An elector whose name has been temporarily removed from the registration books pursuant to Section 98.081(1). Florida Statutes, is not on the registration books. If the elector's name is not on the registration books when a supervisor is verifying signatures on a petition, the supervisor may not verify the elector's signature for a petition.*

Op. Div. Elec. Fla. 87-16 (1987), *partially receded from on other grounds,* Op. Div. Elec. Fla. 91-01 (1991) (emphasis added). Supervisors of elections are bound by advisory opinions of the Division of Elections until such opinions are amended or revoked. § 106.23, Fla. Stat. (1991). Moreover, although not binding judicial precedent, advisory opinions of affected agency heads are persuasive authority and, if the construction of law in those opinions is reasonable, they are entitled to great weight in construing the law as applied to that affected agency of government. *Lee v. Dowda,* 155 Fla. 68, 19 So. 2d 570 (1944); *Beverly v. Department of Business Regulation,* 282 So. 2d 657 (Fla. 1st DCA 1973); *Haines v. St. Petersburg Methodist Home, Inc.,* 173 So. 2d 176 (Fla. 2d DCA), *cert. denied,* 183 So. 2d 211 (1965). We do not find the interpretation rendered by the Division of Elections to be unreasonable or unduly burdensome. Indeed, we find that such an interpretation seeks to fulfill the primary purpose behind chapter 98, that is, to assure integrity in the election process. The prevention of fraud and the maintenance of up-to-date and reliable registration records are necessary to preserve

ballot integrity and a valid election process. Consequently, we find that the minimal burden of either voting at least once every two years or notifying the supervisor in writing that one's status as a qualified elector has not changed is reasonable. Likewise, we find the Division of Elections' interpretation in advisory opinion 87-16 of that notification process to be reasonable. In so finding, we reject the circuit and district courts' holding that the signing of a petition, in and of itself, is the equivalent of notifying the supervisor of elections that the elector's status has not changed and that the elector should be restored to the voter registration list.

A recall or initiative petition is presented to an elector by an advocate of a particular political view. Such a recall or petition is in no way connected to the status notification process. Because status notification for the purpose of being restored to the voter registration list assists in preserving the integrity of the elective and petition political process, that notification should be presented directly to a neutral election official rather than a biased advocate.

We are not persuaded by the argument that Division of Elections advisory opinion 91-01 is controlling and dictates a contrary result. In that opinion, the Division of Elections held that the act of signing the petition by a *valid elector* constitutes sufficient notice under section 98.081 that the elector has moved to a new address within the county and, consequently, that the elector is eligible to sign a petition. Unlike the circumstances of this case where the electors had been removed from the permanent

registration records, the electors contemplated in advisory opinion 91-01 had not been removed from the permanent registration records and were still valid electors. Thus, advisory opinion 91-01 is distinguishable and not applicable here.[1] Moreover, advisory opinion 87-16 specifically reaches a contrary conclusion to the position the Committee asserts that advisory opinion 91-01 supports. Indeed, although the Division of Elections partially receded from advisory opinion 87-16 in advisory opinion 91-01, the Division specifically left intact the portion of 87-16 at issue.

We acknowledge that election laws should generally be liberally construed in favor of an elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law. *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), *cert. denied*, 425 U.S. 967, 96 S. Ct. 2162, 48 L. Ed. 2d 791 (1976). As noted in *Boardman:*

> "The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties. . . . [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal

[1] Because the issues addressed in advisory opinion 91-01 are not currently before this Court, we decline to rule, at this time, on the issue of whether the execution of a petition constitutes sufficient notice to a supervisor of elections that an elector's address has changed so as to allow the elector to validly execute the petition.

> requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law."

323 So. 2d at 268-69 n.5 (quoting from trial court's Final Summary Judgment). We find that similar latitude of judgment should be accorded to election officials in carrying out the process of validating signature petitions.

As indicated, the entire process set forth in section 98.081 as to temporary and permanent removal is to prevent fraud and to assure integrity in the electoral process. In light of the need to maintain the integrity of the verification process by assuring that the elector is still qualified to vote as registered, we find that the express construction of the statute by the Division of Elections in its 87-16 advisory opinion is a reasonable and correct interpretation of the statute. To construe the statute as advocated by the Committee and as held by the trial and district courts would allow a temporarily removed elector to be restored to the electoral rolls by notification to a competitive political advocate rather than to a detached neutral election official. To so hold, in our view, is contrary to the intent and purpose of the statute and would, in fact, constitute a judicial modification of the statute. Further, neither the United States Constitution nor the Florida Constitution requires such an interpretation.

Moreover, we are not convinced that the legislature's continued use of the term "elector" reflects legislative intent to continue considering electors who have been temporarily removed from the registration books as qualified voters. The statute requires an affirmative act of notification by a temporarily removed elector to a neutral election official before the elector can vote. Similarly, some affirmative act of notification directly to the supervisor of elections is required before a temporarily removed elector can sign a petition. The signing of the petition, in and of itself, does not, under this statutory scheme, constitute sufficient notice to the supervisor. Consequently, we find that an elector whose name has been temporarily removed from the registration books is not a qualified voter for the purpose of executing a petition.

In conclusion, we find that Krivanek correctly interpreted the statutory scheme established by the legislature in refusing to validate the signatures of the electors at issue. Given our disposition of this case as to Krivanek's first three issues, we need not reach the question of whether this case must be remanded for a determination of the number of signatures required for a valid petition in this instance.

Accordingly, we quash the district court's decision and find that the writ of mandamus was erroneously issued.

It is so ordered.

BARKETT, C.J., and McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal – Class of Constitutional Officers

Second District – Case No. 91-04045

(Hillsborough County)

Emeline C. Acton, County Attorney and John J. Dingfelder, Assistant County Attorney, Tampa, Florida,

for Petitioner

G. Donovan Conwell, Jr. of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, Florida,

for Respondents

APPENDIX B

Robin C. KRIVANEK, Supervisor of Elections, Hillsborough County, Appellant,

v.

The TAKE BACK TAMPA POLITICAL COMMITTEE and Richard M. Clewis, III, Appellees.

No. 91-04045.

District Court of Appeal of Florida, Second District.

July 1, 1992.

County supervisor of elections appealed from order of the Circuit Court, Hillsborough County, Guy W. Spicola, J., granting petition for writ of mandamus and peremptory writ ordering her to count signatures of certain electors on city referendum petition submitted to her for certification. The District Court of Appeal, Danahy, J., held that petition signers whose names had been temporarily withdrawn from supervisor's permanent registration books were "qualified electors" for purpose of signing petition.

Affirmed.

Municipal Corporations

City referendum petition signers whose names had been temporarily withdrawn from supervisor's permanent registration books due to their failure to vote in the last two years or to return response card to Supervisor of Elections indicating that they wished to remain voters, but who had not been removed from registration books,

were qualified "electors of a municipality" eligible to sign petition and were thus eligible to have their signatures counted by Supervisor, if signatures were otherwise valid. West's F.S.A. §§ 97.021, 98.081(1), 100.361.

See publication Words and Phrases for other judicial constructions and definitions.

Lynn Cash, Asst. County Atty., Tampa, and Yeteva Kemp Hightower, Asst. Gen. Counsel, Tallahassee, for appellant.

G. Donovan Conwell, Jr., of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, for appellees.

DANAHY, Judge.

This is an appeal from an order granting the petition for Writ of Mandamus and the Peremptory Writ which ordered the appellant, Robin Krivanek, the Hillsborough County Supervisor of Elections, [Supervisor] to count the signatures of certain electors on a city referendum petition which was submitted to her for certification. The single issue presented on appeal is whether those petition signers whose names had been temporarily withdrawn from the Supervisor's permanent registration books were "qualified electors" for the purpose of signing the petition. We agree with the circuit court that they were and, accordingly, affirm the issuance of the writ requiring the Supervisor to count their signatures if otherwise valid.[1]

---

[1] While the circuit court discusses constitutional aspects in its order, the Supervisor raises only issues involving statutory construction, and we decide the case on those grounds alone.

The pertinent facts of this case are summarized as follows. The appellees, The Take Back Tampa Political Committee and its chairman, Richard M. Clewis, III, [TBT] initiated a petition drive which sought to put to a city-wide vote the question of repealing city ordinance 91-88. The Tampa city charter, section 10.07, authorizes such an election if a referendum petition is certified as signed by a requisite number of qualified electors, i.e., registered voters who live in the city. During the petition drive, the Supervisor withdrew from her permanent registration books the names of registered voters who had not voted in the last two years and who had not returned a response card to her indicating they wished to remain voters. Section 98.081(1) of the Election Code required her to accomplish this procedure at some time during each odd-numbered year. At this point, the names are "temporarily withdrawn" but not yet "removed" under the circumstances required by section 98.081(2). When the petition was submitted to the Supervisor, she refused to count the signatures of those registered voters she had temporarily withdrawn. Without those signatures, the petition did not have the requisite number for certification by the Supervisor in order to place the question before the entire city electorate.[2] TBT sought and was granted a writ of mandamus to have the Supervisor count the signatures she had not counted previously if they were otherwise valid. The Supervisor complied with the writ of mandamus which resulted in a determination that

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[2] There were other issues before the circuit court concerning technical defects in the petition which caused certain signatures to go uncounted. Those issues are not before this court.

the petition contained a sufficient number of valid signatures to place the issue on the ballot. She also appealed the issuance of the writ arguing that the circuit court's construction of the statute – which compelled her to count as registered voters persons not on her permanent registration books – was contrary to legislative intent.

In deciding this case, we are aided by the comprehensive analysis in the final order of the circuit court which includes, in pertinent part, the following:

> *ISSUE I: Eligibility of Electors temporarily withdrawn from the voter registration list to petition the city*
>
> The first issue before the court is whether the Supervisor may be commanded to accept signatures of electors who were temporarily removed, or in the process of being temporarily removed, from the active voter registration list at the time the Supervisor was attempting to verify the signatures on the petition. The relevant facts presented to the court are that on May 16, 1991, pursuant to section 98.081(1), Florida Statutes, the Supervisor of Elections for Hillsborough County mailed forms to all registered voters who had not voted in the last two years. On June 21, while TBT was circulating the referendum petition, the Supervisor compiled a list of over 25,000 electors to be withdrawn from the active voter registration list. Of the signatures on the petition at issue, the Supervisor rejected 462 because the electors who signed had been temporarily withdrawn pursuant to Section 98.081(1). Four hundred and ten of these electors were withdrawn during the pendency of the petition; 52 had been removed prior to the circulation of the petition. The Supervisor did

accept signatures of persons being removed from the list if they signed the petition before June 21, the date the Supervisor began removing names from the list.

The procedure for periodically updating the registration rolls is set out in Section 98.081, Florida Statutes. The pertinent provisions of this section read as follows:

(1) During each odd-numbered year, the supervisor shall mail, to each elector who, during the past two years, did not vote in any election in the county or did not make a written request that his registration records be updated, a form to be filled in, signed and returned by mail within 30 days after the notice is postmarked. The form returned shall advise the supervisor whether the elector's status has changed from that of the registration record. Electors failing to return the forms within this period shall have their names withdrawn temporarily from registration books . . . The list of electors temporarily withdrawn shall be posted at the courthouse. When the list is completed, the supervisor shall provide a copy thereof, upon request, to the chairman of the county executive committee of any political party . . . A name shall be restored to the registration records when the elector, in writing, makes known to the supervisor that his status has not changed . . . The supervisor shall then reinstate the name on the registration books without requiring the elector to reregister . . . This is not a reregistration but a method to be used for keeping the permanent registration list up to date.

> (2) The name of any elector temporarily withdrawn from the registration books shall be removed from such books if the elector fails to respond to the notice mailed pursuant to subsection (1) within 3 years from the date the last such notice was mailed to him, and such person shall be required to register to have his name restored to the registration books.

The supervisor has a duty under Section 100.361(d), Florida Statutes, to determine whether the "petition contains the required valid signatures." The Supervisor maintains that she did not breach this duty when she rejected the 462 signatures because persons temporarily withdrawn from the rolls are no longer qualified voters. She argues that to be a qualified elector, Article VI, Section 2, of the Florida Constitution, requires that one must be registered as provided by law. In the case of a person temporarily removed from the rolls, the Supervisor contends that that person is not actively registered until he completes the affirmative act of notifying the Supervisor of his status. Furthermore, maintains the Supervisor, the burden should be on the petitioners to determine whether persons signing are actively registered, especially since petitioners knew that a purging process was underway when they began circulating the petition. Finally, the Supervisor states that the procedure she followed is the same as that followed in every other county in this state.

TBT argues that the Supervisor's strict construction of the statutory requirements violates petitioners' fundamental rights to vote and petition. TBT maintains that registered voters do not lose their legal status as electors if their names are temporarily removed from the registration list. They contend that the legislative intent on this

point is clear. TBT points out that Section 98.081(1), Florida Statutes, still refers to persons withdrawn as "electors." Only if an elector fails to notify the supervisor of his status after three years of being on the inactive list does the elector lose his legal status as an elector and become referred to as a "person" under the statute. See § 98.081(2), Fla.Stat. In addition, TBT argues that Section 98.081(1) specifically states that it is not requiring reregistration, but is merely setting up a method for bookkeeping. Therefore, TBT argues that the Supervisor breached her duty pursuant to Section 100.361(d) and (h), Florida Statutes, to count the number of valid signatures on the petition.

A. ELECTORS TEMPORARILY WITHDRAWN FROM THE VOTER REGISTRATION ROLLS PURSUANT TO § 98.081(1), FLA.STAT. RETAIN THE LEGAL STATUS OF "ELECTORS"

The exercise of the right to petition is a form of democratic expression at its purest. This fundamental right is recognized in the First Amendment to the United States Constitution which states that Congress shall make no law abridging the freedom to petition the Government for a redress of grievances. Florida also recognizes the right of its people to petition the government. Art. I § 5, Fla. Const. Locally, Section 10.07 of the Tampa City Charter gives the qualified voters of the city the power to require reconsideration by petition of any adopted ordinance. Also, as stated in Advisory Opinion 91-01, Florida Division of Elections, the right to petition is an inherent and absolute right in contrast to the right to vote which derives from constitutional or statutory grant.

Even an absolute right, however, may be subject to reasonable regulation, and neither party to this case disputes that Section 98.081, Florida Statutes, is facially constitutional. It is well established that the legislature may properly require electors to register to vote and to update registration records periodically, so long as the burden imposed is minimal and incidental. *Smith v. Smathers*, 372 So.2d 427 (Fla.1979); *Williams v. Osser*, 350 F.Supp. 646 (E.D.Penn.1972); *Duprey v. Anderson*, 184 Colo. 70, 518 P.2d 807 (1974); cf. *Michigan State UAW Community Action Program Council v. Austin*, 387 Mich. 506, 198 N.W.2d 385 (1972). However, laws limiting the exercise of voting rights should be liberally construed in favor of giving voters a voice. *State ex rel. Whitley v. Rinehart*, 192 So. 819 (Fla.1939); *Boardman v. Esteva*, 323 So.2d 259 (Fla.1975); *State v. Rinehart*, 140 Fla. 645, 192 So. 819, 823 (1939); *In re Nomination Petition of Justin Johnson*, 502 A.2d 142 (Pa. 1985); 1991 Op.Div. of Elections Fla. 91-01 (Feb. 4, 1991). Therefore this court will uphold only those restrictions on the right to petition which are expressly required by law.

Eligibility to petition is prescribed by ordinance and statute. Section 10.07 of the Tampa City Charter provides that "qualified voters" may petition and that the form and content of the petition shall be as provided for under the provision relating to recall of officers (§ 100.361(1), Fla.Stat). Section 100.361, Florida Statutes, provides that "electors of a municipality" are eligible to sign the petition. "Elector" is defined as being synonymous with the word "voter" or "qualified elector or voter." § 97.021, Fla.Stat.

Article 1, Section 5 of the Florida Constitution defines "elector" as follows:

> Every citizen of the United States who is at least twenty-one years of age and who has been a permanent resident for one year in the state and six months in a county, if registered as provided by law, shall be an elector of that county.

The statutes define a qualified elector as "any person 18 years of age who is a citizen of the United States and a legal resident of Florida and the county where he wishes to register" and who registers to vote. § 97.041(1)(a), Fla.Stat.

None of these provisions specifically addresses the legal effect of being temporarily withdrawn from the registration rolls pursuant to Section 98.081(1). It is clear that the legislature intended to require electors to update their registration records, but it does not necessarily follow that the Supervisor is correct in assuming that withdrawal from active registration renders electors ineligible to petition.

Contrary to the Supervisor's assertion, being placed on the withdrawal list is not the legal equivalent of never having registered or having been permanently removed from the rolls. Inactivated electors have already registered to vote, and, thus, it has already been determined that these people are legally qualified to be electors. In addition, Section 98.081(1), Florida Statutes, states that the withdrawal procedure is not a reregistration, but a method for recordkeeping. Thus, those on the withdrawal list are not required to reregister unlike those who are permanently removed. See § 98.081(2). Rather, the statute places a minimal burden on those temporarily removed to notify the supervisor of their status.

Another distinction is that many of those whose names the Supervisor rejected were clearly intended by the city government to be included in the petition process. Section 10.07 of the Tampa City Charter states that a petition must be signed by electors of the city equal in number to not less than 10 percent of the electors of the city qualified to vote at the last general municipal election. Four hundred and ten of the names rejected had been on the active rolls at the last preceding election. Thus these electors, unlike unregistered persons, were counted in determining the number of signatures to be obtained on the petition. The legislature specifically included these electors in the petition process. Therefore, these electors should not have their right to petition disenfranchised during an open registration period. See *Stillman v. Marston*, 484 P.2d 628 (Ariz. 1971).

Furthermore, unlike those who are not registered to vote (see § 98.051, Fla.Stat.), those on the inactive list may vote even if they have not been reactivated before the closing of the registration books, provided that they sign an affidavit at the polls verifying that their status has not changed. In addition, as petitioner argued, the legislature continued to refer to persons on the withdrawal list as "electors," thereby indicating that their legal status had not changed. See § 98.081(1)

Therefore, the Supervisor has overlooked important distinctions between those who are not registered to vote and those whose names have been temporarily withdrawn from the active rolls. She argues, however, that she is compelled by the statute to purge the rolls every two years of those who do not vote and that this purge affects the status of electors for all purposes. This interpretation

is too strict. In keeping with a liberal construction standard, the general rule is that statutes providing for the revision of the registration books at stated times to maintain accurate records will not affect an elector's eligibility to exercise of other voting rights unless such an intent appears in the statute. *See* 25 Am.Jur.2d § 110; *Stillman v. Marston*, 107 Ariz. 208, 484 P.2d 628 (1971). Nothing in the Florida statute regulates electors on the inactive list to a status equal to that of an unregistered person. On the contrary, for the above-stated reasons, it is obvious that those on the withdrawal list remain electors of the city. Therefore, it appears that the Supervisor has not complied with her duty to count the valid signatures of the electors of the city.

The Supervisor's application of the statute is also inconsistent; she places less restrictions on the right to vote than on the right to petition. At any point during the three years that a person may be temporarily withdrawn from the registration rolls, that person may vote. He may simultaneously update his status and exercise his right to vote by signing an affidavit at the polls. In contrast, the Supervisor has read Section 98.081 to preclude a person's right to petition unless that person has updated his status prior to signing the petition. Placing more restrictions on the right to petition contravenes the directive from the Division of Elections that "provisions relating to the right to petition the government should also be construed liberally to preserve an individual's absolute right to petition their government." See Florida Division of Elections, opinion 91-01.

In rejecting the signatures of those electors placed on the temporary withdrawal list, the Supervisor relied primarily on Advisory opinion 87-16 from the Division of Elections, State of Florida, which states the following:

> An elector whose name has been temporarily removed from the registration books pursuant to Section 98.081(1), Florida Statutes, is not on the registration books. If the elector's name is not on the registration books when a supervisor is verifying the signatures on a petition, the supervisor may not verify the elector's signature for a petition.

This opinion is not persuasive. Again, it equates those on the temporary withdrawal list with those whose names have been permanently removed or who never registered. As stated previously, such a construction is not proper. Also, the opinion states that the reason for not accepting signatures from temporarily withdrawn electors is that it is not possible to verify a signature not on the rolls. However, nothing precludes the supervisor from referring to the signature cards on record to verify the signatures. The supervisor is required by statute to maintain these records because she must reactivate an elector when the elector makes known to the supervisor that his status has not changed. § 98.081(1), Fla.Stat. In addition, the Supervisor testified at her deposition that these records had not been removed from her computer files at the time the signatures were being verified at her office. ([S]ee pg. 21 of the deposition of Robin Krivanek[.)] Therefore, the Supervisor has the records available to verify the signatures.

The Supervisor's [sic] makes two final arguments in opposition to accepting withdrawn names. First, she maintains that if she were required to accept signatures of withdrawn electors, it is conceivable that she would be compelled to accept a petition signed only by persons who were withdrawn. Second, she argues that inactive electors should not be permitted to sign because electors who were inactive prior to the last municipal election were not included in the count of signatures required to petition the city pursuant to § 10.07 of the Tampa City Charter. She argues that if they are included in the right to petition, they should likewise be included in the count of signatures required, thereby increasing the number of signatures required considerably.

The court can find no merit in the first argument. The only basis the court can conceive for excluding those who [are] on the temporary withdrawal list and who are otherwise qualified to vote might be to insure that when the issue is before the voters on referendum, someone will vote on it. However, there is no requirement that a person signing a petition must vote on the issue if it is put before the voters. In addition, those signing the petition are actively participating in the democratic process, and the court can find no reason to distinguish the act of petitioning from the act of voting, for these purposes.

Similarly, the legislature has not restricted the right to petition to those included in the count of the number of signatures required. Conceivably, any one [sic] who registered to vote after the last election could sign the petition. The court cannot deny qualified electors who sign a petition their right to petition simply because the Supervisor did not count them in determining the

number of signatures the petitio[n] required. The court notes that the Supervisor may be correct in asserting that persons on the inactive list at the last election should be included in the count because they are "qualified voters;" [sic] however, the method of determining the number of signatures required is not before the court.

B. ELECTORS WHO SIGN A PETITION PURSUANT TO § 10.07 OF THE TAMPA CITY CHARTER AND § 100.361, FLA.STAT. HAVE COMPLIED WITH THE WRITTEN NOTICE REQUIREMENT OF § 98.081(1), FLA.STAT.

Another compelling argument for accepting the signatures of those electors on the inactive list is the fact that in signing the petition, the elector has in effect notified the supervisor that his status has not changed. The Supervisor argued that electors on the inactive list were distinguishable from active voters in that they were required to perform an affirmative act before being restored to active status – the elector must make known to the supervisor, in writing, that his status has not changed. The Supervisor assumed that all those whose names appeared on her list had failed to perform this act. However, she overlooked the fact that the signing of the petition was such an act. The petition contained, in writing, the signature, current address, and precinct number of the elector – the same information requested on the form sent out to voters pursuant to § 98.081(1), Fla.Stat. Under a liberal construction of § 98.081(1), the supervisor should reactivate an elector who provides the necessary information on the petition especially since the statute's purpose in maintaining accurate records could be achieved by accepting the information provided.

The Division of Elections follows a similar procedure in using the information provided on the petition to record a change of address of an active registered voter. The Division of Elections Advisory Opinion 91-01 states that the act of signing the petition constitutes notice that the elector has moved to a new address within the county and is therefore eligible to sign the petition in accordance with § 97.091(2)(a), Fla.Stat. The Supervisor argues that this procedure should not be followed in the case of electors on the temporary withdrawal list because their status is different from that of an active voter. Again, this strict interpretation is not statutorily mandated and contravenes a liberal construction of the applicable law.

C. ACTUAL TIMING OF SUPERVISOR'S PURGE AND NOTICE OF THE PURGE PROCESS DOES NOT AFFECT ELECTORS' ELIGIBILITY TO PETITION

One final point raised by both parties relates to the timing of the purge and when the purge should be given legal effect. The Supervisor maintains that June 21, 1991, is the operative date because the 30-day grace period had expired and she had identified the names to be placed on the purge list. TBT argues that the operative date should be a date subsequent to her review of the signatures since the actual removal of the names was not complete until sometime in October. The timing of the purge is not an issue, however, since this court has found that the signing of the petition constitutes sufficient notice under § 98.081(1).

Similarly, whether or not TBT had notice of the purge process before it began circulating the petition is not relevant. It appears that the Supervisor knew that TBT would be circulating petitions during the time in which she would be purging the rolls and TBT knew that the

purge process was underway. Since the electors were qualified to sign and the act of signing provided the notice required for reactivation of their status, neither party's knowledge of the other party's intentions has any effect on the outcome of this decision.

We agree with the circuit court that the legislature has not expressly revealed what legal status was intended during the interim period after the elector has been placed on the "temporarily withdrawn" list pursuant to section 98.081(1) but before being "removed" from the registration books pursuant to section 98.081(2). The legislature has, however, clearly expressed its intention that a qualified elector remains "qualified" for three years before the qualification is definitively lost because it is only after that three-year period has passed that the person must register anew to once again become a qualified elector under subsection (2) of the statute. The interpretation placed on subsection (1) by the circuit court is correct: City electors who were placed on the Supervisor's "temporarily withdrawn" list retain their legal status as qualified electors for purposes of signing a referendum petition and were thus eligible to have their signatures counted by the Supervisor if their signatures were otherwise valid.

We have carefully considered the authorities cited to us by the Supervisor, especially *State ex rel. Kyle v. Brown*, 167 So.2d 904 (Fla. 3d DCA 1964), but we find them all distinguishable or unpersuasive.

Because the circuit court correctly interpreted the statute, we affirm the order and approve the issuance of the writ.

LEHAN, C.J., and SCHOONOVER, J., concur.

APPENDIX C

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY, FLORIDA CIVIL DIVISION O

THE TAKE BACK TAMPA POLITICAL COMMITTEE and RICHARD M. CLEWIS, III

Petitioners,

Case No: 91-9798

vs.

ROBIN C. KRIVANEK as THE HILLSBOROUGH COUNTY SUPERVISOR OF ELECTIONS and FRANCES HENRIGUEZ as CITY CLERK of the CITY OF TAMPA,

Respondents.

_____/

ORDER ON PETITION FOR WRIT OF MANDAMUS

This cause came on for consideration upon Petitioners' Petition for Writ of Mandamus. The court issued an Alternative Writ of Mandamus, heard argument from all parties, reviewed the files and memoranda submitted, and conducted its own research.

I. BACKGROUND FACTS

Petitioner, Take Back Tampa (TBT), is a political committee created in June 1991 for the purpose of circulating a petition among the people of the City of Tampa seeking to bring to a referendum the repeal of Tampa Ordinance No. 91-88. Petitioner Clewis is a qualified voter of the

City of Tampa and Chairman of the Take Back Tampa Political Committee. Prior to circulating the petition, TBT contacted the Supervisor to determine how many signatures would be required and was told at that time that the Supervisor would be purging the registration rolls of inactive voters during the month of June. After circulating the petition, TBT filed the petition with the City Clerk on August 12, 1991. The Clerk stated that she received 16,126 signatures. On September 3, 1991, the Supervisor informed the Tampa City Mayor and Chairman of the Tampa City Council that the petition contained signatures of 12,130 qualified electors, 180 signatures short of the number required to present the petition to the council.[1]

Of the signatures rejected by the Supervisor, 462 were signatures of electors of the City of Tampa whose names had been placed on a list of inactive voters. The remainder were rejected by the Clerk for other reasons, including 131 petitions, containing 533 signatures, for errors which petitioner argues were either not error at all or were merely clerical errors. These include petitions in which the circulator did not sign the petition and petitions which the Clerk determined were not properly notarized. The petitioner subsequently submitted affidavits in attempt to correct or supplement most of the 131 petitions

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[1] Section 10.07 of the Tampa City Charter provides that a referendum petition must be signed by electors of the city "equal in number to not less than 10 percent of the electors of the city qualified to vote at the last general municipal election . . . " The supervisor determined that the number of qualified electors was 123,093. Therefore, based on the supervisor's count of electors, petitioner was required to obtain 12,310 signatures.

in question. The Supervisor did not accept the amendments to the petitions.

On September 27, 1991, Petitioner filed a petition for a writ of mandamus with this court seeking to compel the Clerk to submit the 533 signatures at issue to the Supervisor and to require the Supervisor to count these 533 signatures and the 462 signatures of electors of the city which appear on the inactive registered voter list. If the petition then contained the requisite number of signatures, the Supervisor would be required, under the writ, to certify the petition to the council.

This court entered an Alternative Writ in Mandamus on September 30, 1991, commanding respondents to show cause why a Peremptory Writ of Mandamus should not be issued. The Hillsborough County Supervisor of Elections and The City Clerk of the City of Tampa submitted written responses with argument on October 21, 1991. TBT moved for Summary Judgment on October 22, 1991, requesting that the court issue the writ of mandamus. Oral arguments were presented to the court in detail on November 12 and 13, 1991.

II. ISSUES PRESENTED AND COURT'S ANALYSIS

A writ of mandamus may issue when petitioner has a clear legal right to the relief prayed for, the respondent has a clear legal duty to perform the requested act, and petitioner has no other adequate remedy at law. *Hatten v. State*, 561 So. 2d 562 (Fla. 1990). The act must be of ministerial character, invoiving no judgment or discretion on the part of the respondent. *Von Stephens v. The School Bd. of Sarasota Co.*, 338 So. 2d 890 (Fla. 2d DCA 1976).

Therefore, in examining each issue presented, this court must determine the legal rights of the petitioners, the legal duties of the supervisor of elections and city clerk, and whether these duties are ministerial in character.

ISSUE 1: Eligibility of Electors temporarily withdrawn from the voter registration list to petition the city

The first issue before the court is whether the Supervisor may be commanded to accept signatures of electors who were temporarily removed, or in the process of being temporarily removed, from the active voter registration list at the time the Supervisor was attempting to verify the signatures on the petition. The relevant facts presented to the court are that on May 16, 1991, pursuant to Section 98.081(1), Florida Statutes, the Supervisor of Elections for Hillsborough County mailed forms to all registered voters who had not voted in the last two years. On June 21, while TBT was circulating the referendum petition, the Supervisor compiled a list of over 25,000 electors to be withdrawn from the active voter registration list. Of the signatures on the petition at issue, the Supervisor rejected 462 because the electors who signed had been temporarily withdrawn pursuant to Section 98.081(1). Four hundred and ten of these electors were withdrawn during the pendency of the petition; 52 had been removed prior to the circulation of the petition. The Supervisor did accept signatures of persons being removed from the list if they signed the petition before June 21, the date the Supervisor began removing names from the list.

The procedure for periodically updating the registration rolls is set out in Section 98.081, Florida Statutes. The pertinent provisions of this section read as follows:

> (1) During each odd-numbered year, the supervisor shall mail, to each elector who, during the past two years, did not vote in any election in the county or did not make a written request that his registration records be updated, a form to be filled in, signed, and returned by mail within 30 days after the notice is postmarked. The form returned shall advise the supervisor whether the elector's status has changed from that of the registration record. Electors failing to return the forms within this period shall have their names withdrawn temporarily from registration books . . . The list of electors temporarily withdrawn shall be posted at the courthouse. When the list is completed, the supervisor shall provide a copy thereof, upon request, to the chairman of the county executive committee of any political party . . . A name shall be restored to the registration records when the elector, in writing, makes known to the supervisor that his status has not changed . . . The supervisor shall then reinstate the name on the registration books without requiring the elector to reregister . . . This is not a reregistration but a method to be used for keeping the permanent registration list up to date.
>
> (2) The name of any elector temporarily withdrawn from the registration books shall be removed from such books if the elector fails to respond to the notice mailed pursuant to subsection (1) within 3 years from the date the last such notice was mailed to him, and such person

> shall be required to reregister to have his name restored to the registration books.

The supervisor has a duty under Section 100.361(d), Florida Statutes, to determine whether the "petition contains the required valid signatures." The Supervisor maintains that she did not breach this duty when she rejected the 462 signatures because persons temporarily withdrawn from the rolls are no longer qualified voters. She argues that to be a qualified elector, Article VI, Section 2, of the Florida Constitution, requires that one must be registered as provided by law. In the case of a person temporarily removed from the rolls, the Supervisor contends that that person is not actively registered until he completes the affirmative act of notifying the Supervisor of his status. Furthermore, maintains the Supervisor, the burden should be on the petitioners to determine whether persons signing are actively registered, especially since petitioners knew that a purging process was underway when they began circulating the petition. Finally, the Supervisor states that the procedure she followed is the same as that followed in every other county in this state.

TBT argues that the Supervisor's strict construction of the statutory requirements violates petitioners' fundamental rights to vote and petition. TBT maintains that registered voters do not lose their legal status as electors if their names are temporarily removed from the registration list. They contend that the legislative intent on this point is clear. TBT points out that Section 98.081(1), Florida Statutes, still refers to persons withdrawn as "electors." Only if an elector fails to notify the supervisor of his status after three years of being on the inactive list does the elector lose his legal status as an elector and

become referred to as a "person" under the statute. See § 98.081(2), Fla. Stat. In addition, TBT argues that Section 98.081(1) specifically states that it is not requiring reregistration, but is merely setting up a method for bookkeeping. Therefore, TBT argues that the Supervisor breached her duty pursuant to Section 100.361(d) and (h), Florida Statutes to count the number of valid signatures on the petition.

A. ELECTORS TEMPORARILY WITHDRAWN FROM THE VOTER REGISTRATION ROLLS PURSUANT TO § 98.081(1), FLA. STAT. RETAIN THE LEGAL STATUS OF "ELECTORS"

The exercise of the right to petition is a form of democratic expression at its purest. This fundamental right is recognized in the First Amendment to the United States Constitution which states that Congress shall make no law abridging the freedom to petition the Government for a redress of grievances. Florida also recognizes the right of its people to petition the government. Art. I § 5, Fla. Const. Locally, Section 10.07 of the Tampa City Charter gives the qualified voters of the city the power to require reconsideration by petition of any adopted ordinance. Also, as stated in Advisory Opinion 91-01, Florida Division of Elections, the right to petition is an inherent and absolute right in contrast to the right to vote which derives from constitutional or statutory grant.

Even an absolute right, however, may be subject to reasonable regulation, and neither party to this case disputes that Section 98.081, Florida Statutes, is facially constitutional. It is well established that the legislature may

properly require electors to register to vote and to update registration records periodically, so long as the burden imposed is minimal and incidental. *Smith v. Smathers*, 372 So. 2d 427 (Fla. 1979); *Williams v. Osser*, 350 F. Supp. 646 (E.D. Penn. 1972); *Duprey v. Anderson*, 518 P.2d 807 (Colo. 1974); cf. *Michigan State UAW Community Action Program Council v. Austin*, 198 N.W.2d 385 (Mich. 1972). However, laws limiting the exercise of voting rights should be liberally construed in favor of giving voters a voice. *State ex rel Whitley v. Rinehart*, 192 So. 819 (Fla. 1939); *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975); *State v. Rinehart*, 192 So. 819, 823 (Fla. 1939); *In re Nomination Petition of Justin Johnson*, 502 A.2d 142 (Pa. 1985); 1991 Op. Div. of Elections Fla. 91-01 (Feb. 4, 1991). Therefore, this court will uphold only those restrictions on the right to petition which are expressly required by law.

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None of these provisions specifically addresses the legal effect of being temporarily withdrawn from the registration rolls pursuant to Section 98.081(1). It is clear that the legislature intended to require electors to update their registration records, but it does not necessarily follow that the Supervisor is correct in assuming that withdrawal from active registration renders electors ineligible to petition.

Contrary to the Supervisor's assertion, being placed on the withdrawal list is not the legal equivalent of never having registered or having been permanently removed from the rolls. Inactivated electors have already registered to vote, and, thus, it has already been determined that these people are legally qualified to be electors. In addition, Section 98.081(1), Florida Statutes, states that the withdrawal procedure is not a reregistration, but a method for recordkeeping. Thus, those on the withdrawal list are not required to reregister unlike those who are permanently removed. See §98.081(2). Rather, the statute places a minimal burden on those temporarily removed to notify the supervisor of their status.

Another distinction is that many of those whose names the Supervisor rejected were clearly intended by

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Furthermore, unlike those who are not registered to vote (see §98.051, Fla. Stat.), those on the inactive list may vote even if they have not been reactivated before the closing of the registration books, provided that they sign an affidavit at the polls verifying that their status has not changed. In addition, as petitioner argued, the legislature continued to refer to persons on the withdrawal list as "electors," thereby indicating that their legal status had not changed. See § 98.081(1).

Therefore, the Supervisor has overlooked important distinctions between those who are not registered to vote and those whose names have been temporarily withdrawn from the active rolls. She argues, however, that she is compelled by the statute to purge the rolls every two years of those who do not vote and that this purge affects the status of electors for all purposes. This interpretation is too strict. In keeping with a liberal construction standard, the general rule is that statutes providing for the

revision of the registration books at stated times to maintain accurate records will not affect an elector's eligibility to exercise of other voting rights unless such an intent appears in the statute. See 25 Am. Jur. 2d §110; *Stillman v. Marston*, 484 P.2d 628 (Ariz. 1971). Nothing in the Florida statute relegates electors on the inactive list to a status equal to that of an unregistered person. On the contrary, for the above-stated reasons, it is obvious that those on the withdrawal list remain electors of the city. Therefore, it appears that the Supervisor has not complied with her duty to count the valid signatures of the electors of the city.

The Supervisor's application of the statute is also inconsistent; she places less restrictions on the right to vote than on the right to petition. At any point during the three years that a person may be temporarily withdrawn from the registration rolls, that person may vote. He may simultaneously update his status and exercise his right to vote by signing an affidavit at the polls. In contrast, the Supervisor has read Section 98.081 to preclude a person's right to petition unless that person has updated his status prior to signing the petition. Placing more restrictions on the right to petition contravenes the directive from the Division of Elections that "provisions relating to the right to petition the government should also be construed liberally to preserve an individual's absolute right to petition their government." See Florida Division of Elections, Opinion 91-01.

In rejecting the signatures of those electors placed on the temporary withdrawal list, the Supervisor relied primarily on Advisory Opinion 87-16 from the Division of Elections, State of Florida, which states the following:

> An elector whose name has been temporarily removed from the registration books pursuant to Section 98.081(1), Florida Statutes, is not on the registration books. If the elector's name is not on the registration books when a supervisor is verifying the signatures on a petition, the supervisor may not verify the elector's signature for a petition.

This opinion is not persuasive. Again, it equates those on the temporary withdrawal list with those whose names have been permanently removed or who never registered. As stated previously, such a construction is not proper. Also, the opinion states that the reason for not accepting signatures from temporarily withdrawn electors is that it is not possible to verify a signature not on the rolls. However, nothing precludes the supervisor from referring to the signature cards on record to verify the signatures. The supervisor is required by statute to maintain these records because she must reactivate an elector when the elector makes known to the supervisor that his status has not changed. §98.081(1) Fla. Stat. In addition, the Supervisor testified at her deposition that these records had not been removed from her computer files at the time the signatures were being verified at her office. (see pg. 21 of the deposition of Robin Krivanek). Therefore, the Supervisor has the records available to verify the signatures.

The Supervisor's [sic] makes two final arguments in opposition to accepting withdrawn names. First, she maintains that if she were required to accept signatures of withdrawn electors, it is conceivable that she would be compelled to accept a petition signed only by persons who were withdrawn. Second, she argues that inactive

electors should not be permitted to sign because electors who were inactive prior to the last municipal election were not included in the count of signatures required to petition the city pursuant to § 10.07 of the Tampa City Charter. She argues that if they are included in the right to petition, they should likewise be included in the count of signatures required, thereby increasing the number of signatures required considerably.

The court can find no merit in the first argument. The only basis the court can conceive for excluding those who on [sic] the temporary withdrawal list and who are otherwise qualified to vote might be to insure that when the issue is before the voters on referendum, someone will vote on it. However, there is no requirement that a person signing a petition must vote on the issue if it is put before the voters. In addition, those signing the petition are actively participating in the democratic process, and the court can find no reason to distinguish the act of petitioning from the act of voting, for these purposes.

Similarly, the legislature has not restricted the right to petition to those included in the count of the number of signatures required. Conceivably, any one who registered to vote after the last election could sign the petition. The court cannot deny qualified electors who sign a petition their right to petition simply because the Supervisor did not count them in determining the number of signatures the petitio [sic] required. The court notes that the Supervisor may be correct in asserting that persons on the inactive list at the last election should be included in the count because they are "qualified voters;" however, the method of determining the number of signatures required is not before the court.

B. ELECTORS WHO SIGN A PETITION PURSUANT TO § 10.07 OF THE TAMPA CITY CHARTER AND § 100.361, FLA. STAT. HAVE COMPLIED WITH THE WRITTEN NOTICE REQUIREMENT OF §98.081(1), FLA. STAT.

Another compelling argument for accepting the signatures of those electors on the inactive list is the fact that in signing the petition, the elector has in effect notified the supervisor that his status has not changed. The Supervisor argued that electors on the inactive list were distinguishable from active voters in that they were required to perform an affirmative act before being restored to active status – the elector must make known to the supervisor, in writing, that his status has not changed. The Supervisor assumed that all those whose names appeared on her list had failed to perform this act. However, she overlooked the fact that the signing of the petition was such an act. The petition contained, in writing, the signature, current address, and precinct number of the elector – the same information requested on the form sent out to voters pursuant to §98.081(1), Fla. Stat. Under a liberal construction of §98.081(1) the supervisor should reactivate an elector who provides the necessary information on the petition, especially sincé the statute's purpose in maintaining accurate records could be achieved by accepting the information provided.

The Division of Elections follows a similar procedure in using the information provided on the petition to record a change of address of an active registered voter. The Division of Elections Advisory Opinion 91-01 states that the act of signing the petition constitutes notice that the elector has moved to a new address within the county

and is therefore eligible to sign the petition in accordance with §97.091(2)(a), Fla. Stat. The Supervisor argues that this procedure should not be followed in the case of electors on the temporary withdrawal list because their status is different from that of an active voter. Again, this strict interpretation is not statutorily mandated and contravenes a liberal construction of the applicable law.

C. ACTUAL TIMING OF SUPERVISOR'S PURGE AND NOTICE OF THE PURGE PROCESS DOES NOT AFFECT ELECTORS' ELIGIBILITY TO PETITION

One final point raised by both parties relates to the timing of the purge and when the purge should be given legal effect. The Supervisor maintains that June 21, 1991, is the operative date because the 30-day grace period had expired and she had identified the names to be placed on the purge list. TBT argues that the operative date should be a date subsequent to her review of the signatures since the actual removal of the names was not complete until sometime in October. The timing of the purge is not an issue, however, since this court has found that the signing of the petition constitutes sufficient notice under § 98.081(1).

Similarly, whether or not TBT had notice of the purge process before it began circulating the petition is not relevant. It appears that the Supervisor knew that TBT would be circulating petitions during the time in which she would be purging the rolls and TBT knew that the purge process was underway. Since the electors were qualified to sign and the act of signing provided the

notice required for reactivation of their status, neither party's knowledge of the other party's intentions has any effect on the outcome of this decision.

CONCLUSION AS TO ISSUE 1

The electors who were temporarily withdrawn pursuant to Section 98.081, Florida Statutes, have a legal right to petition the city pursuant to Section 10.07 of the Tampa City Charter. The Supervisor has a duty under Section 100.361(d) and (h) to count the valid signatures to a petition, certify whether the petitions have the required number of valid signatures, and report her finding to the city council. Because TBT is precluded from obtaining additional signatures or otherwise amending the petition pursuant to Section 100.361(d), TBT has no other adequate remedy at law. This court finds, therefore, that a writ of mandamus should issue to compel the Supervisor to count the valid signatures of electors of the City of Tampa that the Supervisor previously rejected because they were on the inactive registered voter list. The Supervisor shall not reject a signature on the petition on the basis that it is the signature of an elector whose name has been temporarily withdrawn from the registration records pursuant to § 98.081(1).

ISSUE 2: Statutory Requirements of Form of Petition

TBT is challenging the Clerk of the City of Tampa's rejection of certain petitions for failure to conform with statutory requirements. At issue are 131 petitions which the Clerk rejected for the following reasons: 30 petitions were not signed by the circulator; on 10 petitions the

circulator and notary is the same person; 18 petitions were not signed by the notary; 6 petitions contained no notary seal; 4 petitions were not dated by the notary; 4 petitions showed that the notary's commission had expired; 29 were not signed by either the circulator or the notary; and on 30 petitions, the notary date precedes the circulator's signature date. The Clerk determined that the total number of signatures contained on these petitions is 533.

TBT maintains that the Clerk erred in rejecting these petitions because she imposed requirements beyond those which are mandated by statute. TBT contends that petitions need only comply with the requirements set out in § 100.361(1)(a) and (c) and § 117.03(1), Florida Statutes, and those statutes dealing with the technical requirements for acknowledging a document would not apply. Furthermore, even if this information were required, argues petitioner, the Clerk should not have rejected the petitions because the errors were merely clerical, and petitioner has submitted a number of affidavits attempting to correct these errors. TBT maintains that the law requires that the Clerk ignore clerical errors if the document substantially complies with the statutory requirements for execution.

The Clerk responds that she only rejected those petitions which did not comply with the statutes. She relied on the statutory requirements of § 100.361(1)(c) and (h) and §§ 117.07-09, Florida Statutes, dealing with notarization. She also contends that some of the errors are not as obviously clerical as the petitioner has suggested. The Clerk further argues that the statutes specifically prohibit any amendments to the petition once it is filed with the

clerk, and therefore TBT was not entitled to supplement the petition with affidavits.

Under section 100.361(1)(d) and (h), the City Clerk is charged with determining whether a petition is facially valid, i.e., whether it is properly verified by the oath of the circulator. The requirements for a petition are as follows:

> Each petition shall contain appropriate lines for signatures and addresses of electors and an oath, to be executed by the circulator thereof, verifying the fact that the circulator saw each person sign the counterpart of the petition, that each signature appearing thereon is the genuine signature of the person it purports to be, and that the petition was signed in the presence of the circulator on the date indicated.

§100.361(1)(c). The Clerk must determine whether a petition is valid based on the petition as it is submitted to her. The statutes specifically preclude the amendment of the petition after it is filed with the clerk. §100.361(1)(d). Therefore, the Clerk was correct in refusing to supplement the petitions with the affidavits provided by TBT.

Similar to the determination of who is eligible to sign, the procedures for creating a valid petition also affect the exercise of the fundamental right of electors to petition. Therefore, these limitations will be liberally construed in favor of the right to petition. Another way to state this is to say that the statute will be strictly construed so that electors must only comply with those procedures specifically set out by the legislature. *State ex rel. Whitley v. Rinehart*, 192 So. 819 (Fla. 1939).

TBT argues that the rule of substantial compliance should be applied to any errors in the circulators' oaths. This court recognizes that substantial compliance is often the rule applied to the taking of acknowledgments and oaths, but this rule is also considered in conjunction with the specific statutory requirements for verification. See *House of Lyons v. Marcus*, 72 So. 2d 34 (Fla. 1954); *Johnson v. Republican State Committee*, 502 A.2d 142 (Pa. 1985); *In re Initiative Petition No 347 State Question No. 639*, 813 P. 2d 1019 (Okla. 1991). In light of the specific requirements of the petitioning process, it does not appear appropriate to apply the substantial compliance rule to the clerk's review of the petition for facial validity.

Because of the time-consuming procedures involved in verifying the petitions, the legislature has imposed some mandatory requirements in the form of the petition and in the time allowed for processing the petition. It is this court's opinion that these mandatory requirements must be strictly complied with to maintain the integrity of this process so that issues may be brought before the appropriate officials in a timely manner. See *State, ex rel Esch v. Lake Co. Bd. of Elections*, 575 N.E.2d 835 (OH 1991). Included within these requirements, is the requirement that each petition contain a properly verified oath. §100.361(1)(h). Strict enforcement of only those procedures required does not constitute an elevation of form over substance, but rather is essential to effectively administer the petitioning process.

Deciphering the statutes to determine what constitutes a facially valid petition is not an easy process. A number of provisions must be referred to and pieced together to reach an understanding. This court will

attempt to follow the statutory requirements for each issue presented in a logical fashion, but recognizes that these issues may need further clarification by the legislature, and strongly recommends clarification be sought.

A. SIGNATURE OF THE CIRCULATOR

Thirty petitions were rejected because of defects in the circulator's signature. In a number of petitions, the circulator printed his name rather than signed it, and in a few the circulator neither signed nor printed his name. Section 100.361(1)(c) requires that the petition contain an oath executed by the circulator. Section 92.525(4)(c), Florida Statutes, dealing with the verification of documents, states that to verify a document, the document must be signed or executed. Thus, if the circulator neither signed nor printed his name, the circulator failed to execute an oath and the petition is not valid. However, the "execution" of an oath does not necessarily require a cursive signature. The definition of "execute" in Blacks Law Dictionary (6th ed.) includes "to complete;" "to make;" "to sign;" and "to perform." In Section 92.525(4)(c), Florida Statutes, the legislature recognized that signing and executing a document are not necessarily synonymous.

Furthermore, the Florida Supreme Court has recognized that "there is no material difference whether a party to a contract executes it by affixing his initial or his complete signature. If either is an act of the party in authentication of the document, it is equally binding on him." *Gendzier v. Bielecki*, 97 So. 2d 604, 607 (Fla. 1957). In the case of the petition, the circulator is required to verify the signatures on the petition by taking the oath; the act

of affirming that this oath was taken may be accomplished by signing or printing his name, as long as the petition indicates that the circulator did take the oath. Therefore, the Clerk should not have rejected those petitions on which the circulator printed his name but did not sign his name.

B. NOTARIZATION OF CIRCULATOR'S OATH

1. Signature and seal of Notary are required

Section 100.361(1)(c) and (h), Florida Statutes, provides that each petition must be verified by the oath of the circulator. Statute 92.50, Florida Statutes states that oaths "may be taken or administered by or before any judge, clerk, or deputy clerk . . . or any notary public within this state." The statute further provides the following:

> The jurat, or certificate of proof or acknowledgment, shall be authenticated by the signature and official seal of such officer or person taking or administering the same . . .

Therefore, at a minimum, the petition must contain the notary's official seal and signature to properly verify the oath.

2. Petition is not valid if notary's commission has expired

TBT argues that the Clerk rejected some petitions because the notary failed to include the date his commission expired. The Clerk maintains that she only rejected petitions in which the commission had expired according

to the date of expiration given by the notary. The court could only find petitions in which the commission had apparently expired.

Under Section 92.50, Florida Statutes, oaths may be administered by notary publics. Notary publics are appointed by the governor for specific terms. §117.01(3). A notary may not act after the expiration of his commission. §117.08. Therefore, if it appears on the face of the petition that the notary is not authorized to verify the petition, the Clerk is required to reject the petition.

3. Signature dates are not required but if provided they must indicate that oath was properly executed

Petitioner is correct in maintaining that the statutes do not specifically require the circulator or notary to date their signatures. Therefore, failure of the notary or circulator to date the petition does not render the petition facially invalid, and the clerk must accept these petitions. However, if dates are provided, and the notary's signature predates the circulator's signature, the Clerk should reject the petition because the date discrepancy indicates that the oath may not have been properly executed.

Section 100.361(1)(c), Florida Statutes, requires that the circulator execute an oath verifying the fact that the circulator saw each person sign the petition and that it is the genuine signature of the person it purports to be. This oath, therefore, must necessarily be executed after the petition is complete. If the notary date suggests that the oath was executed before the circulator completed the

process of obtaining signatures, the oath would not comply with Section 100.361(1)(c). Although most of these errors were most likely inadvertent, the burden is on the petitioner to properly execute the oath and the court would be placing an undue burden on the Clerk if it were to require her to try to distinguish which errors in dating were inadvertent and which were not.

4. Circulator may not verify his own oath

The Clerk maintains that 10 of the petitions at issue were rejected because the circulator and the notary were the same person. TBT did not present any argument on this issue. The court finds that the Clerk is correct in rejecting these petitions in light of §117.01, Florida Statutes.

CONCLUSION AS TO ISSUE 2

The Clerk of the City of Tampa has a ministerial duty pursuant to Section 100.361(1)(c), (d) and (h) to determine the facial validity of the petitions. The Clerk failed to perform this duty in rejecting petitions for the following reasons: circulator printed his name rather than signed his name, notary did not date the petition; and circulator did not date the petition. A writ of mandamus should issue to compel the Clerk to accept these petitions if they are otherwise facially valid.

CONCLUSION

This court finds that the Supervisor has breached her duty to verify signatures of all qualified electors pursuant

to Section 10.07 of the Tampa City Charter and Section 100.361, Florida Statutes. This court further finds that the City Clerk for the City of Tampa failed to comply fully with her duties under Section 100.361. Because qualified electors have a legal right to be included in the petition process and to have signatures on facially valid petitions submitted to the Supervisor for verification, Petitioners are entitled to a writ of mandamus compelling the Supervisor and Clerk to perform these ministerial functions.

It, therefore, appearing that a peremptory writ of mandamus should issue in the matter and that the petitioner has no plain, speedy, or other adequate remedy in the ordinary course of law, it is hereby,

ORDERED AND ADJUDGED that the Peremptory Writ of Mandamus will issue to command the following:

1. The City Clerk of the City of Tampa, Frances Henriguez, within 10 days from the Clerk's receipt of this Peremptory Writ of Mandamus, shall submit to the Supervisor of Elections for Hillsborough County, Robin Krivanek, all petitions which the Clerk did not previously submit to the Supervisor based upon the following omissions/errors:

(a) Circulator executed the Petition by printing name instead of using cursive writing;

(b) Notary did not date Petition;

(c) Circulator did not date Petition.

2. The Supervisor, within 10 days of receipt of the Peremptory Writ of Mandamus, shall count the valid signatures of electors of the City which appear on the

Petition which were not counted because of the omissions/errors stated in one (1) above.

3. The Supervisor, within 10 days of the Supervisor's receipt of the Peremptory Writ of Mandamus shall count the valid signatures of electors of the City of Tampa which the Supervisor previously rejected because they were temporarily withdrawn from the active registration list pursuant to §98.081(1).

4. If the number of signatures of electors of the City of Tampa which the Supervisor previously counted and accepted, plus the number of signatures of electors of the City of Tampa which the Supervisor counts and accepts in accordance with paragraphs 2 and 3 above, equal or exceed 12,310, then the Supervisor shall certify in writing to the Tampa City Council that the Petition contains a sufficient number of signatures to meet the requirements of §10.07, Tampa City Charter and shall set forth the number of valid signatures of electors of the City of Tampa that were counted. The Supervisor shall make this certification within 15 days from the Supervisor's receipt of a Peremptory Writ of Mandamus from this Court.

DONE AND ORDERED in chambers in Tampa, Hillsborough County, Florida, this 22nd day of November, 1991.

/s/ Guy W. Spicola
Guy W. Spicola, Circuit Judge

cc:
G. Donovan Conwell, Jr., Esq
Charles Wachter, Esq.
Tyron Brown, Esq.
Robert Warchola, Esq.

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY,
FLORIDA CIVIL DIVISION

THE TAKE BACK TAMPA POLITICAL COMMITTEE and RICHARD M. CLEWIS, III

Petitioners,

Case No: 91-9798

vs.

ROBIN C. KRIVANEK as THE HILLSBOROUGH COUNTY SUPERVISOR OF ELECTIONS and FRANCES HENRIGUEZ as City Clerk of the City of Tampa,

Respondents.

_____/

ORDER CLARIFYING ORDER ON PETITION FOR WRIT OF MANDAMUS

THIS CAUSE came on to be heard upon the Petitioners' Motion for Clarification or Partial Reconsideration. The Court having considered the Motion, argument of counsel, the depositions on file and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that this Court's Order on Petition for Writ of Mandamus entered on November 22, 1991, is clarified as follows:

1. There is nothing in the Record which supports a finding of fact that the Take Back Tampa Political Committee knew at or prior to the time that the circulation of the Petition began that the Supervisor would be purging

the registration records. The Court has not made any finding of fact that the Petitioners knew at or prior to the time that they began circulating the Petition that the Supervisor would be purging the registration records.

2. This Order is made nunc pro tunc to the date of entry of this Court's Order on Petition for Writ of Mandamus dated November 22, 1991.

DONE AND ORDERED in chambers this 5th day of Decmber, 1991.

/s/ Guy W. Spicola
CIRCUIT COURT JUDGE

COPIES TO:

G. DONOVAN CONWELL, JR., ESQ.
ROBERT WARCHOLA, ESQ.
TYRON BROWN, ESQ.

APPENDIX D

Dear Voter,

Our records show that you have not voted or made any changes to your voter registration during the last two years.

In such a case, Florida law requires that a renewal notice be mailed to you.

TO REMAIN A VOTER, SIGN AND RETURN THE ATTACHED VOTER REGISTRATION RENEWAL CARD IMMEDIATELY

If you do not return the card, your name will be suspended from the list of voters. Once suspended, you may be reinstated as a voter at any time within three years upon your written request, if you still qualify.

This notice applies to you only if you still live in Hillsborough County. If you have moved permanently to another county, you must register to vote there.

For additional information, call us at 272-5850 (from the Plant City area, call 754-2621, ext. 5850).

Sincerely,

/s/ Robin C. Krivanek
Robin C. Krivanek
Supervisor of Elections

NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

BUSINESS REPLY MAIL
FIRST CLASS MAIL PERMIT NO. 3994 TAMPA, FL

POSTAGE WILL BE PAID BY ADDRESSEE

SUPERVISOR OF ELECTIONS
Hillsborough County Courthouse
419 Pierce Street Room 195
Tampa FL 33602-9955

ROBIN C. KRIVANEK
SUPERVISOR OF ELECTIONS
HILLSBOROUGH COUNTY
419 PIERCE STREET, ROOM 195
TAMPA, FLORIDA 33602

PRESORTED
FIRST CLASS MAIL
U.S. POSTAGE PAID
TAMPA, FLORIDA
PERMIT NO. 1573

TAMPA FL.

IMPORTANT! VOTER REGISTRATION
RENEWAL NOTICE

IMPORTANTE!
RENOVACION DE INSCRIPCION
PARA VOTAR

SI USTED DESEA PERMANECER ELIGIBLE PARA VOTAR, LLENE Y FIRME LA TARJETA ADHERIDA
SI USTED DESEA RECIBIR ESTA INFORMACION EN ESPANOL. HAGALO ENVIANDO SU NOMBRE Y

DIRECCION A LA DIRECCION DE ARRIBA O LLAME TAMPA 272-5850

TO KEEP YOUR VOTER REGISTRATION ACTIVE, SIGN AND RETURN THIS POSTCARD IMMEDIATELY.

YES, I WANT TO REMAIN A VOTER. X_____

VOTER'S SIGNATURE

IS THIS INFORMATION CORRECT?–

YES [ ]

NO [ ] –Please correct my registration as shown below:

MY CURRENT MAILING ADDRESS IS

If mailing address is a P O Box or a rural route number, complete this line_____

TELEPHONE

MY RESIDENCE LOCATION IS: _____

MY NEW NAME IS: PRINT CLEARLY_____

(for change of name by marriage or other legal process)
Also sign New signature_____

_____

APPENDIX E

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CIVIL DIVISION

THE TAKE BACK TAMPA POLITICAL COMMITTEE and RICHARD M. CLEWIS, III, Petitioners, vs. ROBIN C. KRIVANEK as the HILLSBOROUGH COUNTY SUPERVISOR OF ELECTIONS and FRANCES HENRIQUEZ as City Clerk of the City of Tampa, Respondents.	CASE NO.: 91-9798

DEPOSITION OF:	ROBIN C. KRIVANEK
TAKEN:	Pursuant to Notice by Counsel for the Petitioners
DATE:	November 8, 1991
PLACE:	Dreyer & Associates, Inc. One Mack Center, Suite 100 501 East Kennedy Boulevard Tampa, Florida 33602
TIME:	4:30 p.m. – 7:15 p.m.
REPORTED BY:	Barbara H. Kiley, RPR-CP Notary Public, State of Florida at Large

* * *

[p. 19] we were not allowed to destroy the registration certificates. However, the law has recently been changed where we can microfilm and destroy it. We have yet to buy the microfilming equipment, so we do still have all of our forms.

Q When you strike a person's name from the registration records as opposed to temporarily withdrawing it, what do you do with their signature cards?

A It's put in a file, "cancelled registrations."

Q When in this particular instance did you move the registration cards for the temporarily withdrawn electors out of your office to storage?

A It was within a few weeks ago, I believe. We have to go through the whole file of 350,000 registered voters and pull each one of the cards, and that has taken a while, and we were working on the petition drive. So we have only pulled the signatures fairly recently and moved them out. I can't tell you exactly when.

Q So at the time that the verification process was taking place for these petitions, the original signature cards were still in your office for those persons whose names –

[p. 20] A Yes, absolutely. That's my understanding, yes.

Q And to have physically compared the signatures on the petitions of those persons whose name had been temporarily withdrawn would have required simply pulling the voter registration certificates from your file in your office and making a physical comparison. Is that correct?

A To compare the signature, yes. The person is no longer in the computer file as an active voter, but their certificate and signature cards were present in the office.

Q They were all kept in the same place?

A Right.

Q And what is that place called again?

A We have Diebold power files.

Q Power files?

A Yes. They revolve, so you have stacks and stacks of bins.

Q All right. Now, when did you go through the process of taking the signature off of the computer for those persons whose names were temporarily withdrawn?

A That's an administrative procedure, which I can't give you a date on when that was –

[p. 21] Q Was that done before the petitions were received?

A The petitions were received – let me just look and get a chronology.

Okay. Would you repeat your question, please?

Q Was the erasure of the signature in the computer for those electors whose name were temporarily withdrawn conducted before the petitions were received or after?

A I can't answer you specifically. I believe it was after.

Q And who is the person at your office that did that?

A The removal?

Q Yes.

A It would be one or more of the individuals on the list of people involved with the petition.

Q Exhibit 2?

A Yes.

Q Now, when you move names from the active list to the inactive list, what you're talking about really is not a change, at least as of the date of the purge – and we'll just call it purge for [p. 22] simplicity's sake. We all know what we're talking about. You didn't actually make a change to the voter registration certificates on that date, but you did something else. Is that correct? Something to the computer?

A Yes. The individuals, registered voters, who had not responded to the notice within the 30-day period that is given for them to respond, the law says their names shall then be suspended, and so we suspended them, put them in another computer file from the active voter file. We established a second file, which is called, as you say, for convenience, the purge file.

Q Now, physically what happens to move a name from the active list to the inactive list?

A In the computer it's within the software of the computer. I couldn't tell you exactly. You mean how is it –

Q No. Let me be more clear. What inputs does the operator make to move from active to inactive in the computer?

A It's a mass procedure. We would have scanned all of the returned cards that have come in in the 30-day period. We would scan the voter ID numbers on those. The computer file already has the [p. 23] numbers of everybody who was mailed one of the purge notices. So then it takes that file of people who were mailed. It deletes from that file the numbers of people who have signed and returned their cards. The balance of the file then are the people who are going to be purged, and it's just an automatic procedure. We have to say, "Do it," but –

Q It's just a matter of pressing some keys on the keyboard of the computer?

A Or whatever instructions are given to the computer program, correct.

Q And all the data, though, is kept within the same computer, and it simply creates another file within the computer?

A That's correct.

Q How long does it take? Is it a matter of spending an evening to allow the computer to do this work overnight?

A It actually took 24 hours.

Q And how long do you maintain the names in the inactive list, the inactive file?

A The law says that we maintain them for approximately three years or at least three years. I'm not sure exactly the wording there. And if we in that period of time have not heard anything from [p. 24] the voter – they haven't voted; they haven't approached us with a change of address; they haven't been asked to be reinstated; we have had no contact with the voter – then at the end of that period they are eligible to be cancelled.

Q And that would involve taking their name off the inactive list completely. Is that right?

A Exactly. Exactly.

Q So at that point they're no longer in your computer anywhere?

A That's correct.

Q If someone is convicted of a disqualifying crime, what do you do with their old voter registration certificate?

A It's moved to the cancelled file.

Q And what do you do with their name on the computer?

A It's deleted.

Q If someone fails to notify you for three years after receiving a notice under 98.081(1), what happens to their voter registration certificate?

A It is moved to the cancelled file.

Q And what has happened to the computer record?

A It is removed.

[p. 25] Q If your name is temporarily withdrawn from the registration records and put onto the inactive list in your computer, is there a way by which you can sign something at the polls to permit you to vote?

A Yes, there is.

Q Would you describe that procedure?

A The law just says that the voter must request in writing that he be reinstated, and he must make a statement that his status hasn't changed. We have a number of procedures at the polling place that require the person to, under oath, for instance, make a change of address or a change of name. So we have a combined affidavit form that we use on which they can also – you know, it's one of the steps on the combined affidavit form to request reinstatement.

Q Do you have one of those forms with you?

A No. Do I?

MR. WARCHOLA: I think you do.

THE WITNESS: I didn't bring it.

MR. WARCHOLA: I thought I saw one in here.

(Discussion held off the record.)
(Plaintiffs' Exhibit 4 marked for

* * *

[p. 52] MR. CONWELL: Let's mark the letter from you to the city as Exhibit 7 to this deposition.

(Plaintiffs' Exhibit 7 marked for identification.)

BY MR. CONWELL:

Q Do you consider persons whose names have been put on the inactive list to have lost their status as registered voters?

A No.

Q Do you know what interests, if any, the government has in rejecting signatures on petitions of persons who register to vote, but according to your records have not voted for two years and have not returned your card saying that their status has not changed?

A I certainly don't have any idea what the interest of the government is in that.

Q Did you consider any signatures on the 130 petitions that the city clerk states that she rejected based on errors in the circulator's oath?

A I'm sorry. What was the first part of that question?

Q Did you consider any of the signatures for verification?

* * *

[p. 73] petition, any statute that says that?

A No, I do not.

Q Am I correct that under your application of the law there are persons in the city of Tampa who are registered voters whose signatures are not being counted in a petition to the government?

A That's correct if they are not active registered voters. Correct.

Q But persons on the inactive list?

A Correct.

Q Are you aware of any statute that explicitly states that any class of registered voters are not permitted to petition the government?

A No, I do not know of any such.

MR. CONWELL: I think that's it.

Let me just have a few moments.

(Recess.)

BY MR. CONWELL:

Q Does 97.041 show what you have to do to become a registered voter?

A Those are the qualifications, yes.

Q That's what you have to do to get registered?

A Correct.

Q And after you go through that process,

* * *

APPENDIX F

98.081 Removal of names from registration books; procedure. –

(1) During each odd-numbered year, the supervisor shall mail, to each elector who, during the past 2 years, did not vote in any election in the county or did not make a written request that his registration records be updated, a form to be filled in, signed, and returned by mail within 30 days after the notice is postmarked. The form returned shall advise the supervisor whether the elector's status has changed from that of the registration record. Electors failing to return the forms within this period shall have their names withdrawn temporarily from registration books. In addition, the name of an elector may be removed temporarily from the registration books when any first-class mail sent by the supervisor to the elector is returned as undeliverable. Such name shall not be removed until a diligent effort has been made by the supervisor to locate such elector. This shall constitute such notice for purposes of this section. The list of the electors temporarily withdrawn shall be posted at the courthouse. When the list is completed, the supervisor shall provide a copy thereof, upon request, to the chairman of the county executive committee of any political party, and the supervisor may charge the actual cost of duplicating the list. A name shall be restored to the registration records when the elector, in writing, makes known to the supervisor that his status has not changed. A federal postcard application from a citizen overseas indicating that the elector's status has not changed shall constitute such a written notification to the supervisor.

The supervisor shall then reinstate the name on the registration books without requiring the elector to reregister. Notice of these requirements shall be printed on the voter registration identification card. This method prescribed for the removal of names is cumulative to other provisions of law relating to the removal of names from registration books. This is not a reregistration but a method to be used for keeping the permanent registration list up to date.

(2) The name of any elector temporarily withdrawn from the registration books shall be removed from such books if the elector fails to respond to the notice mailed pursuant to subsection (1) within 3 years from the date the last such notice was mailed to him, and such person shall be required to reregister to have his name restored to the registration books. Receipt of a federal postcard application shall constitute written authorization for such a reregistration.

(3) Any elector may have his name removed from the registration books by filing with the supervisor a written request, duly acknowledged, and upon receipt of such request the supervisor shall remove the name of the elector from the registration books. Any person whose name is removed between the first primary and the subsequent general election shall not register in a different political party after the first primary and before the subsequent general election.

(4) When the name of any elector is removed from the books pursuant to this section, s. 98.201, or s. 98.301, his original registration form shall be filed alphabetically

in the office of the supervisor. As alternatives, registration forms removed from the books may be microfilmed and such microfilms substituted for the original registration forms; or, when voter registration information, including the voter's signature, is maintained digitally or on electronic, magnetic, or optic media, such stored information may be substituted for the original registration form. Such microfilms or stored information shall be retained in the custody of the supervisor of elections. In the event the original registration forms are microfilmed or maintained digitally or on electronic or other media, such originals may be destroyed in accordance with the schedule approved by the Bureau of Archives and Records Management of the Division of Library and Information Services of the Department of State.

(5) When the name of any elector has been erroneously or illegally removed from the registration books pursuant to this section, s. 98.201, or s. 98.301, the name of the elector shall be restored by the supervisor upon satisfactory proof, even though the registration books are closed.

History. – s. 8, ch. 25391, 1949; s. 2. ch. 26870, 1951; s. 1, ch. 61-86; s. 5, ch. 77-175; s. 1, ch. 78-102; s. 14, ch. 79-365; s. 8, ch. 80-292; s. 45, ch. 81-259; s. 18, ch. 81-304; s. 7, ch. 82-143; s. 3, ch. 90-315.

Note. – Former s. 97.08.

APPENDIX G

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT IN AND
FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

THE TAKE BACK TAMPA
POLITICAL COMMITTEE and
RICHARD M. CLEWIS, III

Petitioners,

vs.

Case No:

ROBIN C. KRIVANEK as THE
HILLSBOROUGH COUNTY
SUPERVISOR OF ELECTIONS and
FRANCES HENRIGUEZ as City
Clerk of the City of Tampa,

Respondents.

_____/

PETITION FOR WRIT OF MANDAMU8

The Petitioners, The Take Back Tampa Political Committee ("Take Back Tampa") and Richard M. Clewis, III ("Clewis"), Petition this court for a writ of mandamus, ordering the Respondents to certify a referendum Petition, as set forth more fully below.

I. PARTIE8

1. The Petitioner, Take Back Tampa, is an unincorporated political committee consisting of qualified voters in Tampa, Hillsborough County, Florida and created on or about June 6, 1991 for the purpose of allowing the people of the City of Tampa to vote in a referendum whether to

approve or reject Tampa Ordinance No. 91-88, a copy of which ordinance is attached as Exhibit "A" to this Petition and is incorporated herein by reference. The Petitioner, Clewis, is a qualified voter of the City of Tampa.

2. The Respondent, Robin C. Krivanek (hereinafter "the Supervisor"), is a public officer of Hillsborough County vested with the statutory authority and duty to determine the number of valid signatures appearing on referendum petitions and to certify such petitions. The Respondent, Frances Henriguez, (hereinafter "the Clerk"), is City Clerk of the City of Tampa and has the duty under the Florida Election Code to submit all signed petitions to the Supervisor of Elections.

II. NATURE OF THE RELIEF SOUGHT

3. Take Back Tampa caused a Petition to be circulated in the City of Tampa pursuant to § 10.07 of the Tampa City Charter ("the Charter") seeking to bring to a referendum the repeal of Tampa Ordinance No. 91-88 (the so called "Gay Rights Ordinance"). Take Back Tampa obtained 15,627 signatures on the Petition. Section 10.07 of the Charter requires only 12,310 signatures of "electors of the City" to appear on the Petition. The Supervisor rejected 3,463 signatures and accepted only 12,130, causing a deficiency of 180 signatures. 34 signatures were not even counted. Take Back Tampa could not make up the deficiency with new signatures because the relevant statutes do not permit new signatures to be added to the Petition after the Petition is filed with the Clerk.

462 of the rejected signatures were signatures of electors of the City of Tampa whose names the Supervisor put on a list of inactive registered voters. 410 of those electors were put on the inactive list during the pendency of Take Back Tampa's Petition drive. The Superior unlawfully rejected those signatures because she treated them as signatures of persons who were not "electors."

The Supervisor also unlawfully rejected another 391 valid signatures of "electors" of the City because of alleged clerical errors in the circulators' oaths in some of the Petitions. The Supervisor has not questioned the validity of the electors' signatures appearing on the Petitions containing these alleged errors. Most of the alleged errors involve circulators' oaths that fully comply with the statutes and so are not errors at all. The remaining alleged errors are clerical errors that can be easily cured and do not affect the validity of the circulators' oaths on the Petitions. The persons making these clerical errors submitted affidavits to the Clerk and Supervisor correcting the errors, but the Clerk and Supervisor refused to allow any of the clerical errors to be corrected.

Take Back Tampa demanded that the Supervisor count and accept the valid signatures of electors that she had rejected, but the Supervisor refused to do so in violation of § 10.07 of the Charter, § 100.361(1)(d) and (h) Fla. Stats. Supp. (1990) and § 99.097(3) Fla. Stat. (1989). The Supervisor failed to perform her duties by (1) refusing to count and accept the signatures of 462 "electors of the City" merely because they were on the inactive registered voter list, (2) failing to reinstate on the registration records the names of electors whose names she had temporarily withdrawn when she received Petitions signed

by them showing that their status had not changed, (3) refusing to count and accept the signatures of another 323 electors because of alleged errors in circulators' oaths that fully comply with the statute and so are not errors, (4) refusing to count and accept the signatures of another 68 electors of the City because of alleged clerical errors that are immaterial and do not affect the validity of the electors' signatures, (5) refusing to accept corrections to the alleged clerical errors, (6) refusing to count 34 other signatures of electors, and (7) failing to certify that the Petition contained signatures of "electors" of the City equal to 10% of the electors of the City qualified to vote in the last general municipal election.

The Clerk failed to perform her duties by failing to submit Petitions to the Supervisor as required by § 100.361(d) and (h) Fla. Stat. Supp. (1990) and refusing to accept corrections to alleged clerical errors in Petitions.

But for the failure of the Supervisor and Clerk to perform their ministerial duties, the Petition would have been certified as containing a sufficient number of valid signatures to meet the requirements of § 10.07 of the Charter. The effect of their failure has been that electors of the City of Tampa are being denied their constitutional right to vote on an issue of great public importance. Government is unlawfully disenfranchising these voters.

III. JURISDICTION

4. This Court has jurisdiction over the matter under Fla. Const. Art. 5, § 6, and Fla. R. App. Proc. 9.030(c)(3).

IV. FACTS

5. On May 28, 1991, the Tampa City Council passed Tampa Ordinance No. 91-88, entitled, "An ordinance amending Chapter 12 of the City of Tampa Code by including provisions relative to sexual orientation; defining sexual orientation; prohibiting discrimination on the grounds of sexual orientation in employment; prohibiting discrimination on the grounds of sexual orientation in public accommodations; prohibiting discrimination on the grounds of sexual orientation in real estate transactions; adding a section exempting religious organizations; repealing all conflicting ordinances and parts thereof; providing for severability; providing for effective date" (the "Ordinance").

6. On May 29, 1991, the Mayor of the City of Tampa signed the Ordinance into law to become effective immediately upon signing.

7. On or about June 6, 1991, a group of qualified electors of the City of Tampa formed Take Back Tampa for the purpose of allowing the people of the City of Tampa to approve or reject the Ordinance by referendum vote.

8. Take Back Tampa contacted the Supervisor and the City of Tampa City Attorney's Office regarding the number of signatures needed on a Petition to require the City Council to repeal the Ordinance or to allow the people of Tampa to accept or reject the Ordinance in a city election. The Supervisor and City Attorney informed Take Back Tampa that such a Petition would require the signatures of electors of the City equal to 10% of the electors of the City qualified to vote in the last general

municipal election, as set forth in § 10.07 of the Charter. Section 10.07 describes how to petition for a referendum vote:

> The qualified voters of the city shall have power to propose ordinances to the council or to require consideration of any adopted ordinance by petition signed by the electors of the city equal in number to not less than 10 percent of the electors of the city qualified to vote at the last general municipal election; the form and content of such petition shall be provided for under the provisions relating to recall of officers as herein provided. If the council fails to adopt an ordinance so proposed or to repeal an ordinance so reconsidered, the qualified voters shall approve or reject such ordinance at a city election provided that such powers shall not extend to the budget or capital improvement program or any emergency ordinance, or ordinance relating to appropriation of money, levy of taxes or salaries of city officers or employees.

9. According to the Supervisor, the number of electors of the City of Tampa qualified to vote in the last general municipal election held in March, 1991 was 123,093. The Supervisor informed Take Back Tampa that her office needed signatures from electors of the City of Tampa equal to ten (10) percent of that number to meet the requirements of § 10.07 of the Charter (*i.e.* the Petition required 12,310 signatures).

10. Take Back Tampa prepared a Petition which states:

> PURSUANT TO SECTION 100.361 FLORIDA STATUTES AND TAMPA CITY CHARTER SECTION 10.07, A REFERENDUM OF THE VOTERS

OF THE CITY OF TAMPA AMENDING CHAPTER 12 OF THE CITY OF TAMPA CODE BY DELETING PROVISIONS RELATIVE TO "GAY RIGHTS" AND SEXUAL ORIENTATION AND SPECIAL PROTECTION IN EMPLOYMENT, PUBLIC ACCOMMODATIONS AND REAL ESTATE TRANSACTIONS ON THE BASIS OF SEXUAL ORIENTATION.

THE UNDERSIGNED registered voters in the City of Tampa Petition the City of Tampa City Council to repeal City of Tampa Ordinance No. 91-88 "An ordinance amending chapter 12 of the City of Tampa Code by including provisions relative to sexual orientation; defining sexual orientation; prohibiting discrimination on the grounds of sexual orientation in employment; prohibiting discrimination on the grounds of sexual orientation in public accommodations; prohibiting discrimination on the grounds of sexual orientation in real estate transactions; adding a section exempting religious organizations; repealing all conflicting ordinances and parts thereof; providing for severability; providing for effective date."

If the City Council of Tampa fails to repeal Ordinance 91-88, then the undersigned demands that the qualified voters approve or reject this repeal referendum as provided by City Charter and state law.

Rick Clewis is Chairman of the Take Back Tampa Referendum Committee.

Each Petitioner must sign his/her name in ink or indelible pencil as registered in the Supervisor of Elections' office.

1. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

2. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

3. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

4. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

5. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

6. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

7. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

8. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

9. Signature _____ Residence _____
   Print Name _____ Date ___ Precinct
   #___ Zip ___

10. Signature _____ Residence _____
    Print Name _____ Date ___ Precinct
    #___ Zip ___

OATH OF CIRCULATOR: I VERIFY THAT EACH SIGNATURE APPEARING ABOVE IS

GENUINE AND MADE IN MY PRESENCE ON THE RESPECTIVE DATES INDICATED.

_____ _____

Circulator's Name (Print) Signature Date

Mail completed Petitions to: Take Back Tampa, P.O. Box 82722, Tampa, FL 33682.

State of Florida, Hillsborough County,
Circulator subscribed and sworn to (affirmed) before me this ___ day of _____ A.D. 19___.

My Commission Expires _____ 19___ _____

Notary Public

(Hereinafter this petition shall be referred to as "the Petition.")

11. Take Back Tampa circulated the Petition in Tampa and obtained 15,627 signatures. The electors who signed added to their signature their residential address and precinct number. Each signature was made before a circulator, who verified each signature and made an oath which stated:

> I VERIFY THAT EACH SIGNATURE APPEARING ABOVE IS GENUINE AND MADE IN MY PRESENCE ON THE RESPECTIVE DATES INDICATED.

12. By signing the Petition, *each elector stated* that he or she was "a registered voter in the City of Tampa" and gave his or her current address and precinct number.

13. Take Back Tampa started circulating the Petition on June 13, 1991.

14. On June 21, 1991, while Take Back Tampa was in the process of circulating the Petition among the citizens of Tampa, the Supervisor moved the names of over 25,000 electors of the city from the list of active registered voters to a "suspended" list (hereinafter referred to as the list of "inactive registered voters") by "temporary withdrawal" of their names from the registration records. There was no legal requirement that the Supervisor move those electors' names from the list of active registered voters to the list of inactive registered voters on that date.[1]

15. The Supervisor made this change pursuant to § 98.081(1) Fla. Stat. (1989). The Supervisor confirmed this important fact in memoranda to Take Back Tampa dated September 20, 1991. (A copy of the memoranda is attached as Exhibit "B" to this Petition.) This provision requires the Supervisor, during odd-numbered years, to have names of electors "withdrawn temporarily from the registration books" if they did not vote in an election in the county within the past two years (*i.e.* if they were inactive registered voters). The electors, after receiving written notice from the Supervisor, must notify the Supervisor in writing that their voting status has not changed in order to keep their names on the list of active registered voters.

16. Pursuant to § 98.081(1), when an elector's name has been temporarily withdrawn from the registration records, he or she may require the Supervisor to reinstate his or her name on the registration record by simply

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[1] The names of 52 of the electors who signed the Petition already had been placed on the inactive registered voters list on an earlier date.

submitting a written statement to the Supervisor that his or her status has not changed since the time of registration. The Supervisor then is required to reinstate the elector's name on the registration record. The statute specifically states that this is *not* considered "re-registration." In other words, such electors do not lose their status as "electors" when their names are temporarily withdrawn from the registration record under this provision. The Supervisor continues to maintain a list of the names of the inactive registered voters in the registration records, but on a list separate from the list of active registered voters.

17. On August 12, 1991, Take Back Tampa submitted the Petition to the Supervisor containing *15,627* signatures, addresses and precinct numbers. A copy of such delivery and receipt is attached as Exhibit "C" and is incorporated herein by reference.

18. The Supervisor examined the Petitions and on September 3, 1991, informed the Tampa City Mayor and Chairman of the Tampa City Council that Take Back Tampa's Petition contained the signatures of *only 12,130* electors.

19. On September 5, 1991, the Supervisor reported to Take Back Tampa the result of the Supervisor's determination of whether the Petition contained the required valid signatures, as follows:

Total signatures accepted	12,130
Signature rejected:	
Those not registered	2,541
Did not match record signature	224
County voter	252
Duplicate signature	446
Total rejected	3,463
Total signatures counted	15,593[2]

20. The signatures of electors who signed the Petition before June 21, 1991, but whose names were taken from the list of active registered voters on June 21 and put on the list of inactive registered voters, were among the signatures that the Supervisor accepted. The Supervisor, however, rejected the signatures of 410 electors who signed the Petition after their names were moved to the list of inactive registered voters.

21. The Supervisor rejected another 391 signatures relevant to this petition because of alleged clerical errors in the circulators' oaths. The alleged clerical errors relevant to this petition and the number of valid signatures of electors of the City rejected because of them, are as follows:

> 1. Circulator executed the Petition by printing name instead of using cursive writing (67 signatures).

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[2] The Supervisor has not explained to the Petitioners why the Supervisor counted 34 fewer signatures than Take Back Tampa delivered. Petitioners believe that the category "Those not registered" includes electors on the inactive registered voters list and electors whose signatures were rejected because of alleged errors in the circulators' oaths.

2. Notary date precedes circulator date; *i.e.* the notary misstated the notarization date (203 signatures).

3. Notary did not date Petition (17 signatures).

4. Notary did not list year in which notary commission expired (36 signatures).

5. Notary did not sign Petition (47 signatures).

6. Notary did not affix seal (21 signatures).

The circulators' oaths affected by the first four alleged errors fully comply with the statutes so are not in error. The remaining alleged clerical errors are not material to the sufficiency of the Petition because the Petition substantially complies with the statutes and the alleged errors do not affect the validity of the electors' signatures. The affected electors' signatures are valid. Most of the alleged errors have been corrected by affidavit by the persons who made the alleged errors. The Supervisor refused to accept any corrections or to give *any* opportunity to cure these clerical, immaterial alleged errors. True and correct copies of the Petition pages affected by these alleged errors, with their corrections, are attached as Exhibit "D" to this Petition. True and correct copies of the Petition pages affected by these alleged errors which have not yet been corrected are attached as Exhibit "E" to this Petition.

ARGUMENT

Take Back Tampa, as an association of qualified voters of the City of Tampa, and Clewis, as a qualified

voter of the City of Tampa, have the legal right to petition City Council under § 10.07 of the Charter to repeal the Ordinance or to allow the people of Tampa to approve or reject the Ordinance in a city election. *Board of Public Instruction of Dade County v. State*, 7 So.2d 105, 107 (Fla. 1942). Take Back Tampa and Clewis have a clear legal right to have the signatures of all the "**electors** of the City" who signed the Petition counted, accepted and certified. Section 10.07 City of Tampa Charter; § 100.361 Fla. Stat. Supp. (1990).

The Supervisor has the duty under § 10.07 of the Charter and 100.361(1) (d) and (h) Fla. Stat. Supp. (1990) to count and accept the signatures of all the "**electors** of the City" who signed the Petition.

I. THE SUPERVISOR BREACHED HER STATUTORY DUTY WHEN SHE REJECTED THE VERIFIED SIGNATURES OF 462 "ELECTORS OF THE CITY" MERELY ON THE BASIS THAT THEY WERE ON THE LIST OF INACTIVE REGISTERED VOTERS.

Section 10.07 of the Charter provides that the Petition shall be signed by "**electors** of the city." Section 100.361(1)(a) Fla. Stat. Supp. (1990) provides that "**[e]lectors** of the municipality are eligible to sign the petition." All that the Supervisor must do is determine whether signatures on the Petition are in fact the signatures of "electors" of the city. § 100.361(1)(d) and (h) Fla. Stats. Supp. (1990) (all that the Supervisor *shall* do is "determine the number of valid signatures"). The Supervisor *must* count and accept each valid signature of an elector of the City which appears on the Petition *Id*; § 10.07

Tampa City Charter; § 99.097(3) Fla. Stat. Supp. (1990), (if the "Supervisor determines that the person signing the Petition and the person who registered to vote are one and the same" then the name on the petition "shall be counted as a valid signature"). The Supervisor concedes that she was required to count the valid signatures of each "elector of the City" who signed the Petition. The persons on the inactive registered voters' list are "electors" of the City and their signatures on the Petition should have been counted.

A. A person becomes an "elector" by registering to vote.

"Elector" is not defined in the Charter or the Related Laws, but is defined in the Florida Election Code § 97.021(11) Fla. Stats. Supp. (1990) and in the Florida Constitution Article 6 § 2. The Florida Election Code is incorporated into the election laws of the City of Tampa pursuant to Part B, § 8.23 Tampa City Charter and Related Laws. "Elector" is defined as "synonymous with 'voter' or 'qualified elector or voter'." § 97.021(11) Fla. Stats. Supp. (1990). A "qualified elector" is defined in the Florida Election Code as "any person 18 years of age who is a citizen of the United States and a legal resident of Florida and the county where he wishes to register" and who registers to vote. § 97.041(1)(a) Fla. Stats. (1989). In other words, an "elector," as that term is used in the Florida Election Code and Tampa City Charter, is a person who has registered to vote.

The Florida Constitution defines "elector" as follows:

> Every citizen of the United States who is at least twenty-one years of age and who has been a permanent resident for one year in the state and six months in a county, if registered as provided by law, shall be an elector of that county.

Fla. Const. Art. I, § 5. In other words, someone who has registered to vote in a county is an "elector" of that county. Everyone on the Supervisor's inactive registered voter list has registered to vote in Hillsborough County. Once registered those persons do not lose their legal status as electors except as provided by law. Section 98.041 Fla. Stats. (1989) ("electors registered shall not thereafter be required to register or reregister except as provided by law"). The Supervisor, therefore, was required by § 10.07 of the Charter to count and accept the valid signatures of all persons on the inactive registered voter list in Hillsborough County who reside in the City of Tampa, unless some other law caused those persons to lose their legal status as an "elector of the City."

B. Persons do not lose their legal status as "electors" when their names are temporarily withdrawn from the registration records.

A person can lose his legal status as an "elector" if his name is "removed" from the registration record under § 98.081(2) or (3) Fla. Stat. Supp. (1990) or § 98.301(3) Fla. Stat. (1989) or if his name is "stricken" from the registration record under § 98.281(1) Fla. Stat. (1989). An "elector" whose name is only "temporarily withdrawn" from the registration record pursuant to § 98.081(1) Fla. Stats.,

however, does not lose his or her status as an "elector." The signature of such an "elector," therefore, must be counted under § 10.07 of the Charter as a signature of an "elector." This is crucial here because the Supervisor treated 462 electors whose names were temporarily withdrawn from the registration records as if they were no longer "electors."

The Supervisor misapplied the law by failing to accept these signatures as the signatures of "electors." The Supervisor's unlawful rejection of those signatures resulted in the Petition containing fewer signatures than is required under § 10.07 of the Charter to place repeal of the Ordinance on the ballot for the next city election. (But for the Supervisor's unlawful rejection of those signatures, the Petition would have contained enough valid signatures to require the Tampa City Council to repeal the Ordinance or place it on the ballot for a referendum vote.)

The Florida Legislature made clear in the Election Code that electors whose names have been temporarily withdrawn from the registration records under § 98.081(1) Fla. Stats. are still "electors" of the City under § 10.07 of the Charter. The language that the Legislature used in § 98.081(1) proves it. First, the Legislature specifically used the word "**elector**" in the statute when referring to a person whose name the Supervisor *already had temporarily withdrawn* from the registration record:

> A name shall be *restored* to the registration records when the ***elector,*** in writing makes known to the Supervisor that his status has not changed.

> The Supervisor shall then *reinstate* the name on the registration books without requiring the ***elector*** to reregister.

Section 98.081(1) Fla. Stat. Supp. (1990) (*emphasis added*). This language proves that a person whose name has been temporarily withdrawn (and, therefore, is *not* in the registration record), retains his or her legal status as an "**elector.**"

The Legislature, in contrast, did not use the term "elector" in other sections of the Election Code when referring to persons whose names have been either "removed" under § 98.081(2) or (3) or § 98.301(3)[3], or "stricken" under § 98.201(1), from the registration records.[4] Section 98.081(2) provides that:

> The name of an *elector* temporarily withdrawn from the registration books shall be removed from such books if the *elector* fails to respond to the notice mailed pursuant to subsection (1) within 3 years from the date the last such notice was mailed to him, and such *person* shall be required to reregister to have his name restored to the registration books (*emphasis added*).

The Legislature identifies the affected person as an "elector" *prior to* the three year deadline when the person's

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[3] The word "elector" is not used in § 98.301 Fla. Stats., probably because this section applies in part to deceased persons who, by definition, could not be electors. Obviously, you can lose your status as an elector by dying.

[4] In determining the meaning of a statute the court should consider the statute as a whole rather than from any one part thereof. *Florida Jai Alai Inc. v. Lake Howell Water & R. Dist.*, 274 So.2d 522, 523 (Fla. 1973).

name is "removed," from the registration books. But *after* the elector's name is "removed," the Legislature identifies the affected person with the word "person," not "elector." This further proves that the Legislature intended someone whose name is only "temporarily withdrawn" to retain the legal status of an "elector."

Section 98.201(1) similarly uses the term "elector," when referring to a person *before* he or she becomes disqualified as an elector and the elector's name is "stricken" from the records. The Legislature uses the word "person," when referring to a person *after* his name has been "stricken" from the registration records.[5]

These sections of the Election Code prove that an "elector" does not lose his or her legal status as an "elector" until his name is "removed" from the registration records under § 98.081(2) or is "stricken" from the registration records under § 98.201(1). If your name merely is "temporarily withdrawn" under § 98.081(1) you retain your status as an "elector."

The Legislature's intent that a person whose name is only "temporarily withdrawn" retain his or her legal status as an "elector" is further proven by the language of § 98.081(1) which eliminates the requirement of "reregistration" for an elector whose name has only been "temporarily withdrawn." The statute specifically states

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[5] Under this section, the Supervisor can "strike" your name from the registration record if you become disqualified to vote *e.g.* you are convicted of a disqualifying crime, and after receiving a notice to show cause and presenting evidence at an administrative hearing, the Supervisor determines there is sufficient evidence to strike your name from the registration record.

that the Supervisor shall reinstate the name of an elector who notifies the Supervisor that his status has not changed *"without requiring the elector to reregister."* § 98.081(1) Fla. Stats. Supp. (1990). The Legislature emphasizes this important point in the same statute by repeating:

> *This is not a reregistration,* but a method to be used for keeping the permanent registration list up to date.

Section 98.081(1) Fla. Stat. Supp. (1990) (*emphasis added*). An "elector" by definition, is someone who has registered to vote. If an elector whose name has been temporarily withdrawn is *not* required to *"reregister"* to put his or her name back on the registration record, then that elector *never lost* his or her status as a registered voter.

In contrast, a "person" whose name has been "removed" or "stricken" under § 98.081(2) or (3) or § 98.201(1) must "reregister to have his name restored to the registration books." In other words, such persons lost their legal status as a registered voter and must reregister to regain that status.

Finally, the Legislature's intent that electors whose names are only "temporarily withdrawn" from the registration records retain their legal status as "electors" is proven by the Legislature's statement of purpose in §98.081(1).[6] The statute states that purpose as follows:

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[6] In construing a statute, the court must ascertain and give effect to the intent of the Legislature as expressed in the statute. *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 579 (Fla. 1984).

> *This is not a reregistration but a method to be used for keeping the permanent registration list up to date.*

Section 98.081(1) Fla. Stat. Supp. (1990) (*emphasis added*). The purpose of the temporary withdrawal of electors' names is to give the Supervisor a *procedure* for keeping the voter registration list current. It gives the Supervisor a way to keep track of voters whose status *might have changed*, while the Supervisor waits the three year period required under §98.081(2) before "removing" those names from the registration books. This is a procedural statute affecting administrative, bookkeeping procedures, not a substantive statute affecting legal status. That is what the Legislature meant when it said that this statute is "not a reregistration" (*i.e.* is not a substantive statute affecting an elector's legal status) "but a *method*" for updating the records (*i.e.* is procedural). As set forth below in this Petition, if the statute purported to change the elector's legal status to a non-elector, or to prohibit an elector from petitioning the government, then it would be unconstitutional because it would deprive electors of their right to vote and petition the government. The court should avoid an interpretation of the statute that would render it unconstitutional when it is susceptible to another construction which is constitutional. *McKibben v. Mallory*, 293 So.2d 48, 51 (Fla. 1974). Moreover, "election laws should be construed liberally in favor of the right to vote." *State v. Rinehart*, 192 So. 819, 823 (Fla. 1939). The Supervisor incorrectly construed them against the right to vote.

The ease with which an "elector" whose name has been temporarily withdrawn can have his name reinstated on the registration books is further proof that his

legal status as an "elector" is not affected by the temporary withdrawal. This becomes obvious by comparing the "reinstatement" requirements for an "elector" under §98.081(1) with the "reregistration" requirements of a "person" under §98.081(2) and (3) and §98.281(1).

Reinstatement §98.081(1)	Reregistration §98.081(2) and (3) and 98.281(1)
1. elector makes known in writing that his status has not changed	1. person must make two oaths as set forth in §97.041 2. provide registration date 3. give full name 4. identify your sex 5. state your date of birth 6. list party affiliation 7. identify your race 8. list the state or country of your birth 9. give your residence address at the time of registering 10. give your P.O. mailing address at the time of registering 11. state whether you are disabled 12. the Supervisor must fill in your precinct number 13. the Supervisor must state whether you are able to write your name and, if not, the reason you cannot 14. provide "other information deemed necessary by the Department of State" 15. Provide an affidavit swearing that all the information on the registration form is true (§98.111 Fla. Stat. [1989]).

An elector needs to do very little to have her name reinstated under §98.081(1) because she never lost her status as a registered voter. In contrast, a person whose name has been "removed" or "stricken" (not just temporarily withdrawn) from the registration records under the other sections, must satisfy substantial requirements to "reregister." This is because the electors' legal status has changed to that of a non-registered person or non-elector and could be restored only by "reregistration."

The requirements for reinstatement under §98.081(1) are so minimal that they were satisfied when the electors, whose names the Supervisor temporarily withdrew, merely signed the Petition and gave their current address and precinct number. That is all the information that the statute requires or that the Supervisor requires on the reinstatement notices that she mails out. (A copy of the Supervisor's Reinstatement Notice is attached as Exhibit "F.") Moreover, when the electors signed the Petition they stated that they were as "registered voters of the City of Tampa," thereby indicating their desire to remain a registered voter of the City of Tampa. When the Supervisor received the Petitions she was required by law to reinstate the names of the electors who had signed the Petition whose status had not changed. Her failure to do so was a breach of her ministerial duty set forth in §98.081(1) Fla. Stats.

The Supervisor's failure to reinstate the names of those electors, however, should not have affected the Petition. As set forth above, the electors whose names were temporarily withdrawn retained their legal status as "electors of the City" so the Supervisor was *required* under §10.07 of the Charter to count their signatures,

regardless of whether their names were put back on the active registered voter list. The Supervisor's failure to accept the signatures even after the minimal requirement for reinstatement was met, further shows the Supervisor's misapplication of the law to the Petition.

Finally, in construing the statutes to determine whether electors, whose names have been temporarily withdrawn from the registration record, retain their legal status as "electors," the Court should avoid a construction "that would lead to an absurd result." *McKibben v. Mallory*, 293 So.2d 48 (Fla. 1974). Under the Supervisor's interpretation of §98.081(1) Fla. Stat. many of the persons who are counted in determining the number of signatures required to be on the Petition, are not counted in determining whether that requirement was met. The Supervisor included electors in determining the number of signatures required on the Petition (123,000 electors) that she excluded from signing the Petition. *i.e.* The Supervisor treats persons on the inactive registered voters' list as if they were not "electors." This is an unfair and absurd result.

The Supervisor has taken electors used to define the number of signatures required on the Petition, out of the pool of electors eligible to meet that requirement. The solution is not to reduce for the number of electors used to define the requirement for the Petition. The solution is to include all of the "electors" used to establish the requirement, in the count used to determine if the requirement was met.

The legislature certainly recognized this and would not have intended §98.081(1) to apply the way the Supervisor has applied it. The Supervisor has misinterpreted §98.081(1), leading to an unfair and absurd result.

Even the Supervisor recognizes that the law, as she has applied it, is not fair. In an article published in the Tampa Tribune the Supervisor is quoted as stating, "It's not fair" that people temporarily purged from the voting rolls could not sign petitions to overturn this Gay Rights Amendment.

This Court should reject the Supervisor's interpretation of §98.081(1), which would take from registered voters the right to petition the government, simply because their names were temporarily removed from the registration records. Voters do not lose their rights until their names either have been "removed" or "stricken" from the registration records under §98.081(2) or (3), or §98.201(1) Fla. Stats.

C. The Supervisor had the means to apply the law.

The Supervisor keeps a list of the names of the electors whose names are temporarily withdrawn. That means that the Supervisor's office physically could have looked at the electors' signatures and addresses on the Petition and compared them with the corresponding signatures and addresses on her inactive registered voter list to determine if they were valid signatures. The Supervisor still maintains that list and could fulfill her statutory duty to validate the signatures of those electors if this Court ordered the Supervisor to do so.

Finally, most of the temporarily withdrawn signatures were on the active voter registration list *when the Petition drive started.* The Supervisor knew that the Petition drive was in progress when she ordered that the names of over 25,000 electors of the city be moved from the active, to the inactive, list. There are *no* statutory or other legal requirements that compelled the Supervisor to make the switch when she did. She could have waited until the Petition circulation was completed before temporarily withdrawing the names of many of this City's electors from the registration records.

The Supervisor's timing of the switch was arbitrary. The switch, therefore, was unlawful because it had the effect, under the Supervisor's application of the Election Laws, of disenfranchising voters. (See Section IV below.)

II. THE CLERK AND SUPERVISOR BREACHED THEIR DUTY BY REJECTING PETITIONS THAT COMPLY WITH THE STATUTES.

A. The Supervisor and Clerk rejected 287 valid signatures of electors of the City based on alleged errors that are not errors at all.

Most of the signatures of electors of the City rejected by the Clerk and Supervisor due to alleged errors in the circulator's oath do not contain errors at all because they fully comply with the statutes. Four categories of alleged errors fall into this category, as follows:

1. *Circulator executed the Petition by printing name instead of using cursive writing.* Section 100.361(1)(a) and (c) Fla. Stat. requires that the circulator "execute" an oath. "Execute" does not necessarily mean "sign." Section

92.525 Fla. Stat. (1989) states that to verify a document it must be "signed or executed." The Florida Legislature recognizes that "sign" and "execute" are not necessarily synonymous.

The circulators' printing of their name, coupled with the notarization of that act and the circulators' affidavits in Exhibit "D" prove that the circulators who printed their names instead of using cursive writing "executed" the required oath. No one can dispute that the circulators who executed the circulators' oath by printing their name, saw the Petitions signed by the electors and made the circulators' oath on the Petition.

2. *Notary misstated the notarization date.* The statutes simply do not require either the notary or the circulator to write in the date on which they signed the Petition. The only persons required to date their signature on the Petition are the electors. §100.361(1)(c) Fla. Stat. Supp. (1990). If the statutes do not require the circulators or notaries to write in the date on which they signed the Petition, then their insertion of an incorrect date is not material. Moreover, nothing in the law requires the notary to sign the Petition and affix his or her seal on the same date that he witnessed the circulator make the required oath. The notary could witness the oath one day, sign the Petition the next day and place his or her seal on it the third day.

The only important fact is that the circulator makes and executes the oath in the presence of the notary. *Collins v. State*, 465 So.2d 1266, 1267 (Fla. 2d DCA 1985) ("an oath must be an unequivocal act in the presence of an officer authorized to administer oaths by which the

declarant knowingly attests the truth of a statement and assumes the obligation of an oath"). The Petitions on which the notaries misstated the date fully comply with that requirement. The notaries swore under oath that the circulator made and signed the circulators' oath in their presence. The clerical mistake in writing in the wrong dates is immaterial because the dates are not even required.

3. *The Notary did not date the Petition.* For the reasons stated in number two above, the notary's failure to date the Petition is not error. The statutes simply do not require this.

4. *The notary did not print the date that his or her commission expires.* This also is not required. Section 117.07(1) Fla. Stat. (1989) requires the date of expiration to be shown only on a "certificate of acknowledgement." Section 117.03(1) Fla. Stat. (1989) points out that a notary "shall not take an acknowledgement of execution, as provided in §117.07 in lieu of an oath when an oath is required." Section 100.361(1) requires an oath. The notary's certificates on the petitions, therefore, are not certificates of acknowledgement and the date of expiration of the notary's commission is not required.

The Supervisor and Clerk rejected 323 valid signatures of electors of the City of Tampa based on the four above-identified alleged errors. The Clerk and the Supervisor breached their ministerial duties by unlawfully denying electors of the City of Tampa their right to petition by not counting their signatures. This Court must compel them to perform their ministerial duty and count

and accept the valid signatures of the electors affected by their unlawful refusal to count.

B. Any errors in the circulators' oath were merely clerical in nature and the Supervisor and Clerk were bound by law to disregard them. Their failure to disregard clerical errors was a breach of their ministerial duties and elevated form over substance.

The unrebutted affidavits of the circulators and notaries in Exhibit "D" make clear that the errors alleged by the Clerk and Supervisor are at most clerical mistakes in the circulators' oaths. The oaths "substantially comply" with the statutes and therefore, are valid. 58 Am. Jur.2d *Oath and Affirmation* § 22 (1989), (. . . "mere formalities are not, in cases of this kind, essential to the validity of the act, and if there is substantial compliance with the statute the oath is obligatory and binding"). Similarly, "statutes prescribing the form of an oath should not be interpreted in an overly technical manner." *Id.*

Although oaths are not "acknowledgements," they are similar in nature to them. An "oath" is a "declaration of truth of a statement." 58 Am. Jur.2d *Oaths and Affirmations* §1 (1989). An "acknowledgement" is a "public declaration or formal statement of the person executing an instrument, made to the official authorized to take the acknowledgement that the execution of the instrument was his free deed and act." 1 Fla. Jur.2d *Acknowledgements* §1 (1977). Cases regarding clerical errors in acknowledgements should apply to clerical errors in oaths because oaths and acknowledgements are similar in nature.

Clerical mistakes in acknowledgements must be disregarded. The Florida Supreme Court says so. In *House of Lyons v. Marcus*, 72 So.2d 34 (Fla. 1954), the Florida Supreme Court ruled on the validity of an acknowledgement that did not fully comply with a statute requiring acknowledgement of a mortgage. The court, in recognizing the validity of the non-complying acknowledgement, recognized first that "it is the established policy of the law to uphold certificates of acknowledgement." *Id.* at 36. The court went on to state:

> . . . wherever substance is found, obvious clerical errors and all technical omissions will be disregarded. Inartificialness in their execution will not be permitted to defeat them, if looking at them as a whole, either alone or in connection with the [instrument], we find that they *reasonably* and *fairly* indicate a compliance with the law.

Id., (*emphasis added*). The policy behind the rule is clear. The law will not honor "form over substance." *Duke v. Heppleston*, 258 F.Supp. 313, 314 (S.D. Fla. 1966), *aff'd* 386 F.2d 996 (5th Cir. 1967).

Clerical misstatements of date are among the type of errors in acknowledgements that must be disregarded. The court in *Carnegie Hill Realties Securities v. Surowitz*, 150 NYS.2d 850, 851 (N.Y.S. Ct. 1956) ruled so, in recognizing the validity of a notarization, notwithstanding a clerical error. In *Carnegie Hill*, the notary's stamp on a petition that was required to be verified stated that the notary jurat expired in 1955, although it in fact would not expire until 1957. The court disregarded the clerical error and recognized the validity of the verification on the

petition. Similarly, in the present case, the Clerk and Supervisor were required to disregard clerical errors in the circulator's oath because the oaths and certificates fairly and reasonably indicate compliance with the law.

The four alleged errors identified in subsection "II. A." above, do not violate any provision of the law and, therefore, are not errors. Seen in their worst possible light, however, they are, at most, clerical errors. The acknowledgements affected by them "reasonably and fairly indicate a compliance with the law." Therefore the alleged clerical errors must be disregarded.

The "execution" of the circulators' oath by printing rather than using cursive writing still expresses the circulator's written pledge that he or she made the oath. The notary's sworn statement that the circulator made and subscribed to the oath in the notary's presence is further proof that the circulator executed the oath. Finally, the circulators' unrebutted affidavits in Exhibit "D" prove that the circulators executed the oaths.

The notary's misstatement of the notarization date, likewise, at its worst, is nothing more than a clerical error. The affidavits of the notaries in Exhibit "D" proves that the notary simply wrote in the wrong date. They did not notarize the circulator's oath before the circulator ever made the oath. They simply wrote down the wrong numbers when writing the date on the Petition. The circulator's oath still is valid because the notary certified on the Petition that the circulator made the oath and subscribed to it in the notary's presence.

The court in *Duke v. Heppleston*, 258 F.Supp. 313, 314 (S.D. Fla. 1966), *affirmed* 386 F.2d 996 (5th Cir. 1967) faced

nearly identical facts and confirmed the validity of an acknowledgement. The acknowledgement on the promissory note in *Duke* was dated October 15, 1960, but the transaction did not occur until October of 1962. The court commented that the defective form of the acknowledgement appeared to be a typographical error. The court ruled that "at worst, there is a defect in form but not of substance" and that "an erroneous date does not make an acknowledgement defective." *Id.* Likewise, in the present case, the notaries merely misdated their certificate, an error in form, not substance. The signatures on the petitions affected by these alleged errors should have been counted.

The circulator's oaths in which the notary did not date the Petition are valid for the same reasons that the misdated Petitions are valid.

The circulator's oath on which the notary did not list the year in which the notary commission expired is the same type of clerical error that the court considered in *Carnegie Hill Realties Securities, supra.* As in *Carnegie Hill,* the court here has evidence before it regarding when the commissions in fact will expire. The notaries who failed to write in the year in which their commissions will expire filed affidavits (See Exhibit "D") which set forth on copies of the Petitions the date that their commissions expire. These affidavits prove that the commissions of the notaries who failed to write in their commission expiration dates, were still valid commissions when they verified the circulators' oaths.

The circulators' oaths that contain a notary's seal but not a notary's signature, or a notary's signature but not a

seal also substantially comply with the statute. The key requirement, that the circulator make and execute the oath in the presence of a notary is present. The absence of a signature or seal from a notary is a fact issue involving authentication of the notary's written oath. The requirement of authentication is met by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Section 90.901 Fla. Stat. (1989). The seal or signature, standing alone, authenticates the notary's certificate. The addition of the notary's affidavit (Exhibit "D") removes all doubt of whether the notaries' certificates in question are authentic.

III. THE SUPERVISOR FAILED TO PERFORM HER MINISTERIAL DUTY BY FAILING TO COUNT 34 SIGNATURES.

As pointed out above in this Petition, the Supervisor has the duty to count all of the signatures submitted to her. The number of signatures that the Supervisor reported that she counted is 34 signatures fewer than the number of signatures submitted to be counted. If the Supervisor failed to count those 34 signatures then she breached her ministerial duty and should be compelled by mandamus to count them.

IV. THE SUPERVISOR AND CLERK VIOLATED THE CONSTITUTIONAL RIGHTS OF ELECTORS TO VOTE AND PETITION THE GOVERNMENT.

The actions of the Supervisor and Clerk also have disenfranchised Tampa voters in violation of the United States and Florida Constitutions. The right to vote is a

fundamental constitutional right. U.S. Const. Amend I, XIV; Fla. Const. Art. 6, §2. Equally important is the right to petition the government in order to put a matter of great public importance on the ballot. *Id.*; Art. 1, §5. "Citizens have the unquestioned right to petition their governments for redress of what they believe are grievances. . . . One means of preserving this right is through the procedures of initiative, referendum and recall." *Diaz v. Board of County Com'rs of Dade County*, 502 F. Supp. 190, 193 (S.D. Fla. 1980). The right to vote also encompasses the right of voters to place their names on petitions seeking a recall or other action. *Pena v. Nelson*, 400 F. Supp. 493, 496 (D. Ariz. 1975). The Supervisor's refusal to count the names of registered voters has deprived these voters of their fundamental rights under the First and Fourteenth Amendments to the U.S. Constitution as well as Art. 6 of the Florida Constitution.

A municipality may not refuse to accept voters' names on a petition unless there is a *compelling* state interest which outweighs these fundamental rights. *Pena v. Nelson*, 400 F.Supp. 493, 496 (D. Ariz. 1975). In *Pena*, the court ruled that it was improper to disqualify voters' names on recall petitions simply because the petitions were circulated by deputy registrars. 400 F.Supp. at 496. There was no compelling reason in that case to distinguish between deputy registrars and non-deputy registrars so long as the voters who signed the petition were actually registered voters. *Id.* In this case, there is no compelling reason to presumptively disqualify voters who have not voted in the past two elections when those same voters have verified their status on the Petition. It is likewise unconstitutional to deny the voters' right to be

counted on this Petition as a result of easily curable clerical errors. These technical difficulties do not constitute the compelling state interest required to disqualify petition signatures. To disqualify voters' names based on easily curable technical defects not only abridges the fundamental right to vote and petition the government, but likewise constitutes an equal protection violation. *Pena v. Nelson,* 400 F.Supp. 493, 496 (D. Ariz. 1975).

CONCLUSION

The Supervisor and Clerk violated their ministerial duties by refusing to count the valid signatures of "electors" of the City. The court should issue a writ of mandamus to the Clerk ordering the Clerk to deliver to the Supervisor the Petitions which were rejected based upon the alleged clerical errors identified in this Petition. The Court should issue a writ of mandamus to the Supervisor ordering the Supervisor to count the valid signatures of electors of the City of Tampa which appear on the Petition that the Supervisor previously rejected because they were on the inactive registered voter list. The Supervisor also should be ordered to count the valid signatures of electors of the City of Tampa which appear on the Petitions that were not counted because of the alleged clerical errors. Finally, the supervisor should be ordered to certify the Petition to the Tampa City Council as containing a sufficient number of signatures of electors of the City to meet the requirements of §10.07 of the Charter.

REQUEST FOR ORAL ARGUMENT

Petitioners request the opportunity to present oral argument.

VERIFICATION

The facts stated in this Petition are true and correct to the best of my knowledge, information and belief.

/s/ Richard M. Clewis, III
RICHARD M. CLEWIS, III

The foregoing was sworn to and subscribed before me by Richard M. Clewis, III, this 27th day of September, 1991.

/s/ Kimberly C. Ward
NOTARY PUBLIC STATE OF FLORIDA AT LARGE MY COMMISSION EXPIRES SEPT. 24, 1992 BONDED THRU AGENT'S NOTARY BROKERAGE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of this Petition for Writ of Mandamus to be served upon Robin A. Krivanek, Hillsborough County Supervisor of Elections, 419 Pierce Street, Room 195, Tampa, FL 33602-4082 and Frances Henriguez, Clerk of the City of Tampa, Fifth Floor, City Hall, 315 East Kennedy Boulevard, Tampa, FL 33602, by delivering it to a process server for personal service on the 27th day of September, 1991.

/s/ G. D. Conwell, Jr.
ATTORNEY